BRITISH PRIZE COURT DECISION IN THE CHICAGO PACKING HOUSE CASES

In November, 1914, four vessels of Norwegian register, the *Kim*, the *Alfred Nobel*, the *Bjornstjerne Bjornson*, and the *Fridland*, bound from New York to Copenhagen, were captured on their voyage by British warships and their cargoes were seized on the ground that the foodstuffs, which constituted the bulk of the shipments, were conditional contraband suspected of being destined for the government or armed forces of Germany.

In September, 1915, the British Prize Court rendered its decision condemning as prize the shipments of foodstuffs which belonged to the Chicago Packers. An appeal was taken by the Packers to the Privy Council, but while this appeal was pending, negotiations for a settlement were entered into by the British Government with the Packers, and a settlement having been agreed upon, disposing of the questions at issue so far as they were concerned, the appeal was withdrawn.

Of all the decisions of the Prize Court affecting the rights of neutrals, this decision was perhaps the most important and most disturbing to neutrals, for, although it applied in terms only to certain particular shipments, the decision in its conclusions as to the law of contraband and the doctrine of continuous voyage in relation to conditional contraband had a general application to all neutral commerce, and not only was it exceedingly prejudicial to neutral interests, but it invoked the authority of British Orders-in-Council as superior to international law. For these reasons it would have been interesting and useful from the point of view of international law and in the interest of determining exactly what was the law to be applied by the British Prize Court to have had this decision carried to the Privy Council for review on appeal. Inasmuch, however, as that was prevented by the settlement of these particular cases, it may be of interest to examine some of the grounds upon which it was contended in the settlement negotiations that the position taken by the Prize Court in condemning these shipments was

inconsistent with and unsupported by the law of contraband applicable in such cases as previously interpreted and recognized both by the Government of Great Britain and by the Government of the United States, and particularly the ground that neutral rights under the principles and rules of international law, as hitherto established, governing neutral trade, were not subject to limitation by British Orders-in-Council or other municipal legislation.

One of the principal objections urged against this decision was that it disregarded the essential differences between absolute and conditional contraband of war, to which both Great Britain and the United States were committed by precedent and practice, and deprived goods listed as conditional contraband of the protection to which they were entitled under international law.

Since the beginning of the war, and at the time these seizures were made, foodstuffs were listed as conditional contraband in all the contraband proclamations of the British Government, and all of the shipments of foodstuffs which were condemned in these cases stood on the basis of conditional contraband. Even the special food products which the court held might be used for the production of glycerine were entitled to treatment as conditional contraband, because, when these shipments were seized, glycerine was listed as conditional contraband.

To these shipments the Prize Court applied the doctrine of continuous voyage or transportation. This doctrine the court held had become part of the law of nations at the commencement of the present war both in relation to carriage by sea and transportation by land. As applied to the carriage of absolute contraband, the correctness of this statement of the law was not questioned, but it cannot be admitted that this doctrine has heretofore been applied to the carriage of conditional contraband, except in special circumstances, with well-defined limitations, or that such an application of this doctrine has been adopted by the consensus of nations. If it had been so adopted, it would not have been rejected in the Declaration of London.

In its application to absolute contraband when consigned to a neutral country, this doctrine imposes upon the captor the burden of proving an intention on the part of the shipper that the goods shall proceed by a continuous voyage or transportation to an enemy country

as part of a single commercial transaction, complete from its inception, without interruption by sale into the common stock in trade of the neutral country before going forward to the enemy territory.

Any extension of this doctrine to conditional contraband, therefore, must necessarily impose upon the captor the same burden of proof as in the case of absolute contraband. Moreover, conditional contraband is not liable to condemnation as contraband unless the captor proves not only that the goods were on their way to enemy territory under the conditions above defined, but also that, as part of the same transaction, they were necessarily predestined to the enemy government, or its military forces as the real consignees.

The Prize Court seems to have disregarded these requirements.

In all of these cases the ship's papers showed a neutral destination, and no positive proof to the contrary was furnished on the part of the Crown. Furthermore, in each of these cases an affidavit was furnished by the shipping companies, sworn to by a responsible officer of the company, to the effect that:

> The whole of the said goods were shipped to the order of the said Agent in Copenhagen for sale in the Agent's own district as aforesaid, in the ordinary course of business. The standing instructions to the Agent that no sales were to be made outside the Agent's district were never withdrawn by the Claimants and the Agent had no authority to sell the goods except to firms established in Denmark, other Scandinavian countries, Finland, or Russia.

and

> None of the said goods had in fact been sold prior to the seizure of the Steamship and they were at the date of such seizure the property of the Claimants.

The court clearly understood the meaning and effect of these affidavits, as appears from the following comment upon them in the decision:

> Germany is not named; and the impression conveyed, and clearly intended to be conveyed, was that the goods were shipped and consigned for purely Scandinavian business, as if the war had not intervened.

Nevertheless, the court adopted the contention of the Crown that the shippers intended these goods to go through to Germany by con-

tinuous voyage, without interruption by sale in neutral territory, although the case of the Crown rested wholly on presumptions or inferences drawn from circumstances which when impartially considered are at most no more significant of an enemy destination than of a neutral destination. Apparently the only reason for the adoption by the Prize Court of the presumption of an enemy destination was because the claimants did not undertake to disprove mere possibilities of a destination which had not been proved as a fact by the Crown.

In order to establish a presumption that shipments consigned to a neutral country were actually intended by the shippers to proceed to enemy territory, the Prize Court laid great stress upon the existence of a surplus supply of foodstuffs in the neutral country to which these shipments were consigned. The existence of a surplus supply of foodstuffs, obviously, is wholly inconclusive as proof that these particular shipments were intended to proceed by continuous transportation through the neutral country as part of the original transaction initiated by the shippers, and the objections of the Government of the United States to the presumption of enemy destination based upon evidence of greatly increased imports into neutral countries adjoining Great Britain's enemies, were made clear in the note addressed on October 21, 1915 by it to the British Government in relation to the restraints imposed by the British Government upon American commerce.

In that note it was stated that such a presumption arising from such circumstances was:

> too remote from the facts and offers too great opportunity for abuse by the belligerent, who could, if the rule were adopted, entirely ignore neutral rights on the high seas and prey with impunity upon neutral commerce.

and that

> To such a rule of legal presumption this Government cannot accede, as it is opposed to those fundamental principles of justice which are the foundation of the jurisprudence of the United States and Great Britain.

There is no reason in law why the residents of a neutral country adjacent to an enemy of Great Britain should not export its own food products to Germany, or food products imported from another neutral

country for that purpose, and American food products shipped to the neutral country to supply a demand thus created cannot lawfully be treated as contraband.

That note further called attention to the fact that His Majesty's Government have admitted that British exports to neutral countries adjacent to Germany also have increased materially since the present war began, and pointed out that:

> Thus Great Britain concededly shares in creating a condition which is relied upon as a sufficient ground to justify the interception of American goods destined to neutral European ports. If British exports to those ports should be still further increased, it is obvious that, under the rule of evidence contended for by the British Government, the presumption of enemy destination could be applied to a greater number of American cargoes, and American trade would suffer to the extent that British trade benefited by the increase. Great Britain cannot expect the United States to submit to such manifest injustice or to permit the rights of its citizens to be so seriously impaired.

As further stated in that note:

> Whatever may be the conjectural conclusions to be drawn from trade statistics, which, when stated by value, are of uncertain evidence as to quantity, the United States maintains the right to sell goods into the general stock of a neutral country, and denounces as illegal and unjustifiable any attempt of a belligerent to interfere with that right on the ground that it suspects that the previous supply of such goods in the neutral country, which the imports renew or replace, has been sold to an enemy. That is a matter with which the neutral vendor has no concern and which can in no way affect his rights of trade.

Another reason for challenging the validity of that presumption was furnished by the court itself, for it decided, as shown below, that the surplus supply of foodstuffs in Denmark did not raise the presumption of destination to Germany in the case of foodstuffs imported into Denmark by residents of Denmark.

In every instance in which foodstuffs seized on these vessels were shown to belong, at the time of their seizure, to residents of the neutral country to which they were consigned, the Prize Court held that they were not liable to condemnation, and ordered their release. A distinction was thus drawn in the case of foodstuffs shipped from the United States to Denmark between those owned by residents of Denmark,

and those owned by residents of the United States and consigned to their selling agents in Denmark. But the situation thus created by a surplus supply of foodstuffs in Denmark had exactly the same bearing upon additional foodstuffs imported by Danish owners as upon those imported by the agents of the American shippers, and if it did not create a presumption that the Danish importers were importing with the intention of selling to the German market, it could not justly be held to create that presumption in the case of the American shippers.

This discrimination against shipments of conditional contraband from the United States to a neutral country, unless such shipments were owned by and made to residents of that country, in effect established an embargo against trade between the United States and neutral countries when carried on by American citizens, even if they had resident agents in those neutral countries, and permitted such trade to be carried on only when in the hands of residents of those neutral countries. It may be that it was not the intention of the court to establish such an unfair discrimination against American interests; but whether intentional or not, the fact that the decision of the court produced that result did not inspire confidence in the conclusions reached by the court.

It is unnecessary, however, for the purposes of the present discussion of this decision to examine into the sufficiency of the evidence upon which the court based its presumption of destination to enemy territory, because, as stated in the American note above mentioned, "even if goods listed as conditional contraband are destined to an enemy country through a neutral country, that fact is not in itself sufficient to justify their seizure."

The conclusion of the court on that branch of the case, therefore, was wholly immaterial, unless, as above pointed out, destination to enemy territory was coupled with proof that the enemy government, or its military forces, were the real consignees, and it is to the treatment by the court of this second and indispensable branch of the case that attention is particularly directed.

The *Kim* was the only one of these four ships which sailed subsequent to the British Order-in-Council of October 29, 1914, and in deciding this branch of the case the court considered separately the

shipments on the *Kim* from the shipments on the other vessels, and dealt with the *Kim* case under the provisions of the Declaration of London as adopted and modified by that Order-in-Council, leaving the other cases to be dealt with under the rules of international law, independently of the Declaration of London or Orders-in-Council.

In the case of the *Kim* the court applied the provisions of paragraphs 3 and 4 of the order, which imposed upon the owner of shipments of conditional contraband to neutral ports the burden of proving that their destination was innocent "if the goods are consigned 'to order' or if the ship's papers do not show who is the consignee of the goods, or if they show a consignee of the goods in territory belonging to or occupied by the enemy."

As in all the other cases, the foodstuffs on the *Kim* which were condemned were consigned to the shippers themselves, or their order, or to named consignees in the neutral country acting as the selling agents of the shippers in that country, or to the order of such consignees, and none of these shipments were consigned, in the words of the Order-in-Council, simply "to order." The consignment of shipments simply "to order" is a well established form of consignment, and unquestionably the language of the Order-in-Council was intended to apply to that particular form. Nevertheless, in applying this Order-in-Council, the court disregarded its express terms, which are emphasized by placing the words "to order" in quotation marks, and construed it as applicable to shipments which were not simply "to order" but to the order of named consignees, and held that this established a presumption of enemy destination which must be disproved by the shipper. The court condemned these shipments as contraband because the shippers declined to undertake this burden, which they contended was not imposed upon them either by international law or, by the terms of the British Order-in-Council on the facts in this case, which facts, moreover, they contended did not justify a presumption of enemy destination.

It is true that in the *Springbok* case (5 Wall. 1), which is cited by the Prize Court in support of this decision, a presumption of destination to a port other than the one named in the ship's papers was drawn in the special circumstances of that case, because the consignment was

"to order or assigns." But the presumed port of destination in that case was a blockaded port, and the condemnation was for an intended breach of blockade. A presumption of destination to a blockaded port may arise from a much simpler state of facts than a presumption of enemy destination, but no question of blockade is involved here, as no blockade had been established when these seizures were made. In the *Springbok* case no presumption of destination to the enemy government or its armed forces was drawn from the consignment "to order," and the court did not hold and the decision does not furnish a precedent for the present contention that conditional contraband is subject to condemnation merely because destined to enemy territory. In the case of conditional contraband, as above pointed out, it is not sufficient merely to show that shipments are destined to enemy territory, and even if these shipments in the present case had been consigned simply "to order," as provided in this Order-in-Council, and even if the rule in the *Springbok* case was applicable, the presumption thereby raised that they were destined to proceed beyond a neutral port to enemy territory would not be sufficient to justify their condemnation as contraband.

In other words, a consignment to order is not presumptive evidence of enemy destination in the case of conditional contraband, and therefore the presumption of enemy destination in such a case, which the British Order-in-Council of October 29th has imposed upon the Prize Court, rests upon a state of facts which is wholly insufficient to support that presumption. The Prize Court held that it was bound to adopt this presumption on account of the rule laid down by this Order-in-Council, and in giving effect to this presumption, explained in the decision that:

> As to the modifications regarding presumptions and onus of proof, as, for instance, where goods are consigned "to order" without naming a consignee, these are matters really affecting rules of evidence and methods of proof in this Court, and I fail to see how it is possible to contend that they are violations of any rule of International Law.

This view calls for a most emphatic dissent if the interests of neutrals are not to be abandoned to the arbitrary control of a belligerent. The Order-in-Council attempted to impose upon neutral shippers the burden

of disproving a fact the existence of which had not been established and the burden of proving which rested with the Crown, and this shifting of the burden of proof clearly affected a substantial right of the claimants. The condemnation of these shipments because of this shifting of the burden of proof shows how seriously their substantial rights were thereby affected. Furthermore, the legality of a presumption drawn from a fact which is wholly insufficient to support that presumption, cannot be admitted.

Neither the British Government, nor a British Prize Court, is at liberty to impose upon neutral commerce, which is not voluntarily within their jurisdiction, a regulation restricting a substantial right to which neutrals are entitled under international law.

In this connection it will be recalled that the Government of the United States had previously informed the British Government in a communication addressed to the British Government on July 15, 1915, that in so far as American interests are concerned:

> the Government of the United States will insist upon their rights under the principles and rules of international law as hitherto established, governing neutral trade in time of war, without limitation or impairment by Orders in Council or other municipal legislation by the British Government, and will not recognize the validity of prize court proceedings taken under restraints imposed by British municipal law in derogation of the rights of American citizens under international law.

In these circumstances it was clear that the Government of the United States could not fail to regard the enforcement by the British Prize Court of these provisions of the British Order-in-Council of October 29th in conditional contraband cases as a violation of substantial rights of American claimants and as contrary to the recognized principles of international law, and could not recognize as valid the decision of the Prize Court in that respect.

The court itself apparently had some doubt as to the legality of the condemnation of the *Kim* cargo on the above grounds, for, notwithstanding its conclusion that under the Order-in-Council of October 29th, the goods claimed by the shippers on the *Kim* were confiscable as lawful prize, the court proceeded to include the *Kim* cargo with the cargoes of the other three vessels before it, in considering the question

of their confiscability apart from the operation of the Order-in-Council of October 29th.

With regard to these vessels the court held that neither the Order-in-Council of October 29th, nor any previous one, was applicable to them at the time of their seizure, and that the question of the condemnation of their cargoes "must be decided in accordance with the rules of international law." The attitude of the court as to these cargoes was briefly as follows: Starting with the presumption that the cargoes, although ostensibly destined for a neutral port, were in reality destined for Germany, the court proceeded to determine "whether their real ultimate destination was for the use of the German Government or its military or naval forces." In answering this question the court assumed that these foodstuffs were adapted for military use and in part "for immediate warlike purposes in the sense that some of them could be employed for the production of explosives." This referred to the production of glycerine from lard, although glycerine, as above pointed out, was listed at that time as conditional contraband. It also assumed that they were destined "for some of the nearest German ports like Hamburg, Lubeck, and Stettin, where some of the forces were quartered," although the court admitted that "no particular cargo can definitely be said to be going to a particular port," and at most the assumption was based on mere suspicion.

The principal ground, however, on which the court seemed to rest the presumption of destination to the German Government for military use is that, "about 10 millions of men were either serving in the German army, or dependent upon or under the control of the Military Authorities of the German Government, out of a population of between 65 and 70 millions of men, women, and children"; and that "of the food required for the population, it would not be extravagant to estimate that at least one-fourth would be consumed by these 10 million adults."

In support of this inference that a large proportion of these foodstuffs would necessarily be used by the military forces, the court cited the British Foreign Secretary's statement in his note of February 19, 1915, to the American Government that:

> The reason for drawing a distinction between foodstuffs intended for the civil population, and those for the armed forces or Enemy Gov-

ernment disappears when the distinction between the Civil population, and the armed forces itself disappears. In any country in which there exists such a tremendous organization for war as now obtains in Germany, there is no clear division between those whom the Government is responsible for feeding and those whom it is not.

The position of the Prize Court seemed to be that in view of existing conditions in Germany, foodstuffs had lost their status of conditional contraband, and must be treated on the basis of absolute contraband. Whatever might be said as to the propriety of listing foodstuffs as absolute contraband on account of conditions then existing in Germany, it must be remembered that at the time these seizures were made, foodstuffs were actually listed as conditional contraband in the contraband proclamations of the British Government. Neutral shippers were entitled to rely upon the official representations of the British Government, and in order to affect the rights of neutrals, changes in the contraband lists proclaimed by the British Government should have been made and announced by the British Government before the cargoes sailed and not by a process of judicial legislation after the cargoes were seized and placed in the Prize Court.

The Prize Court seems to have entirely overlooked the distinction between changing conditional to absolute contraband by proclamation by the British Government and by judicial legislation by the court. It cites in support of its conclusion that articles listed as conditional contraband may be treated as absolute contraband, an extract from an editorial note in this JOURNAL, which expressed the opinion that in view of the extensive organization of the non-combatant population of Germany for military purposes "it seems likely that belligerents will be inclined to consider destination to the enemy country as sufficient, even in the case of conditional contraband."

The court failed to note that the opinion expressed was that the belligerents and not the Prize Court would be inclined to take this attitude, which really meant that the belligerent governments would be inclined to list as absolute contraband articles usually listed as conditional contraband, and in no sense expressed the view that a prize court could make that change by judicial legislation. Moreover, the statement went no further than to say that "it seems likely that

belligerents will be inclined," and the court itself in the course of the argument noted that the views expressed went no further. As appears from the record of the trial, when this editorial comment was read to the court during the argument, the court said: "That states the very question which has been troubling me a little."

The Solicitor-General responded: "And it takes a decided view of it."

The court replied: "No, I do not think it does. What it says is 'It seems likely that they would be inclined.'"

The subsequent citation of this opinion in support of its decision is suggestive of the extremes to which the court was forced to go in grasping at straws to sustain an unsound position.

The Government of the United States is entitled to insist upon the same treatment of neutral commerce in the present war that it insisted upon in its discussion of the subject with the Russian Government in 1904, during the Russo-Japanese War, and which was clearly set forth in a communication from Secretary of State Hay, as follows:

> When war exists between powerful States it is vital to the legitimate maritime commerce of neutral States that there be no relaxation of the rule — no deviation from the criterion for determining what constitutes contraband of war, lawfully subject to belligerent capture, namely, warlike nature, use, and destination. Articles which, like arms and ammunition, are by their nature of self-evident warlike use, are contraband of war if destined to enemy territory; but articles which, like coal, cotton, and provisions, though of ordinarily innocent are capable of warlike use, are not subject to capture and confiscation unless shown by evidence to be actually destined for the military or naval forces of a belligerent.
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> This substantive principle of the law of nations cannot be overridden by technical rule of the prize court that the owners of the captured cargo must prove that no part of it may eventually come to the hands of the enemy forces. The proof is of an impossible nature; and it can not be admitted that the absence of proof, in its nature impossible to make, can justify the seizure and condemnation. If it were otherwise, all neutral commerce with the people of a belligerent State would be impossible; the innocent would suffer inevitable condemnation with the guilty.
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> The established principle of discrimination between contraband and noncontraband goods admits of no relaxation or refinement. It must be either inflexibly adhered to or abandoned by all nations. There is and can be no middle ground. The criterion of warlike usefulness

and destination has been adopted by the common consent of civilized nations, after centuries of struggle in which each belligerent made indiscriminate warfare upon all commerce of all neutral states with the people of the other belligerent and which led to reprisals as the mildest available remedy.

If the principle which appears to have been declared by the Vladivostok prize court and which has not so far been disavowed or explained by His Imperial Majesty's Government is acquiesced in, it means, if carried into full execution, the complete destruction of all neutral commerce with the non-combatant population of Japan; it obviates the necessity of blockades; it renders meaningless the principles of the declaration of Paris set forth in the imperial order of February 29 last that a blockade in order to be obligatory must be effective; it obliterates all distinction between commerce in contraband and non-contraband goods; and is in effect a declaration of war against commerce of every description between the people of a neutral and those of a belligerent State.[1]

The position of the United States on this subject was again stated by Secretary of State Hay in a further communication to the Russian Government on the same subject in 1905, as follows:

If the cargo were condemned on the ground that the neutral claimant had not offered proofs that no part of the cargo could eventually reach the enemy's forces, it would override the universal presumption in favor of innocence by demanding impossible proofs. If proof were required on the part of the neutral claimant to show that the cargo was destined only to pacific uses, to what extent must he adduce proofs? Must he show that none of the cargo would eventually reach the enemy's forces? If proof so comprehensive be wanting, would the whole cargo be condemned? If it were not shown by the captor that the consignee was an agent or contractor of the enemy's government, must proof be offered by the claimant that he will not sell to one who is such agent even though the purchaser might conceal his agency? The law of nations affords no answer to these questions, and it must therefore be presumed that it does not authorize any seizure and condemnation on the mere ground of the possibility of supplies reaching the military or naval forces of the enemy.[2]

It is evident from the foregoing objections to this decision that the Prize Court was in direct opposition to the Government of the United States in holding that in order to justify condemnation the Crown was not required to show that enemy destination was intended

[1] Foreign Relations of the United States, 1904, p. 762. [2] *Ibid.*, 1905, p. 746.

by the shippers, and that presumptive evidence of destination to enemy territory was sufficient.

On this question of the proof of intention and prearrangement on the part of the shippers of the cargoes, it appears from the decision of the Prize Court that on the part of the claimants —

> It was argued that the Crown as captors ought to show that there was an original intention by the shippers to supply the goods to the enemy Government, or the armed forces, at the inception of the voyage as one complete commercial transaction, evidenced by a contract of sale or something equivalent to it.

This contention was dismissed by the court on the ground that:

> If the captors had to prove such an arrangement affirmatively and absolutely, in order to justify capture and condemnation, the right of belligerents to stop articles of conditional contraband from reaching the hostile destination would become nugatory.

The difficulty with this argument is that a belligerent has no right to stop articles of conditional contraband from reaching enemy territory unless it can show affirmatively the existence of a prearrangement such as that referred to. Unlike articles of absolute contraband, articles of conditional contraband, when shipped to enemy territory, are innocent unless there is shown to be an intention of enemy destination, in addition to mere destination to enemy territory. This essential difference as to the contraband character of articles listed as absolute contraband, and articles listed as conditional contraband, furnishes the explanation of why in the Declaration of London, the doctrine of continuous transportation was adopted as to absolute contraband, but not extended to conditional contraband.

As stated in the extracts above quoted in Secretary Hays' communication on this subject, shippers of conditional contraband are under no obligation to prove that no part of the shipment may eventually come to the hands of the enemy forces, which would be not only to override a substantial principle of the law of nations, but also in most cases would be to demand "impossible proofs." Any other rule would permit condemnation on presumptions against the shippers drawn from mere possibilities, and the law recognizes that such presumptions will

inevitably be drawn in times of prejudice and suspicion. That the temptation to draw such presumptions is too strong to be resisted was well illustrated by the reasoning of the court in this decision, and the unjust burdens thus imposed upon neutral commerce demonstrates the wisdom of the Declaration of London in rejecting the doctrine of continuous voyage so far as conditional contraband is concerned in the present state of the law.

Moreover, the court seems to have overlooked the point that inasmuch as none of the shipments of foodstuffs in these cases came within the particular provisions of the Orders-in-Council of August 20 or October 29, 1914, which undertook to impose the burden of proof upon the claimants, they were entitled to rely upon the assurances given by the adoption of those orders, that the provisions of the Declaration of London not modified by those orders would be observed by the British Government. In other words, they are entitled to invoke the protection of the provisions of Articles 33, 34, and 35 of the Declaration which are of benefit to them, and the effect of which was to impose the burden of proof upon the captor and to establish a presumption of innocence in the absence of certain conditions which did not apply in these cases, and to establish the ship's papers as conclusive proof both as to the voyage upon which the vessel was engaged and as to the port of discharge of the goods.

The court concluded its discussion of these cases by calling attention to a decision in a German prize court as an example of the ease with which "a Prize Court in Germany hacks its way through *bona fide* commercial transactions when dealing with foodstuffs carried by neutral vessels."

In that case foodstuffs were consigned from the United States to Irish ports and were ladened upon a Dutch steamer, and the British Prize Court quoted the following extract from the German Prize Court's decision:

> There is no means of ascertaining with the least certainty what use the wheat would have been put to at the arrival of the vessel in Belfast, and whether the British Government would not have come upon the scene as purchaser, even at a very high price, and in this connection it must also be borne in mind that the Bills of Lading were made out *to order*, which greatly facilitated the free disposal of the cargo.

The British Prize Court disclaimed any intention of following this decision, which it characterized as "a shocking example." Nevertheless, there seems to be very little if any substantial difference distinguishing the two decisions, and it is difficult to perceive wherein the court has not followed this "shocking example" in spite of the best intentions to the contrary.

In addition to the objections above pointed out against the international authority of the Orders-in-Council cited in the decision of the Prize Court, the further objection was urged that these Orders-in-Council were of doubtful authority even as municipal law.

While the settlement negotiations were in progress in the Packers cases, the question of the authority and legal effect generally of Orders-in-Council in relation to prize court proceedings came on for argument on appeal before the Privy Council in the *Zamora* case, and the decision of that court, which was rendered contemporaneously with the close of these negotiations, is of particular interest for that reason.

In the *Zamora* case it appeared that specific powers had been conferred upon the King in Council by an act of Parliament authorizing the making of rules as to the procedure and practice in prize courts. But the specific orders which were under review went further than that and undertook to deal with substantial rights of neutrals, as to which no authority had been conferred upon the King in Council by any act of parliament. In that respect the Orders-in-Council in the *Zamora* case and in the Packers cases stood on the same footing. The Prize Court in both cases construed and followed these Orders-in-Council as an imperative direction binding upon the court on the theory that the King in Council was authorized to exercise such powers by virtue of the Royal prerogative.

On this appeal the Privy Council held that the Prize Court was not bound by executive orders of the King in Council unauthorized by acts of Parliament, for the reasons set out in its decision, from which the following extracts are taken:

> The idea that the King in Council, or indeed any branch of the Executive, has power to prescribe or alter the law to be administered by Courts of law in this country is out of harmony with the principles of our Constitution. It is true that under a number of modern

statutes various branches of the Executive have power to make rules having the force of statutes; but all such rules derive their validity from the statute which creates the power, and not from the executive body by which they are made. No one would contend that the prerogative involves any power to prescribe or alter the law administered in Courts of common law or equity. It is, however, suggested that the manner in which Prize Courts in this country are appointed and the nature of their jurisdiction differentiate them in this respect from other Courts.

. . . . . .

In the first place all those matters upon which the Court is authorized to proceed are, or arise out of, acts done by the sovereign Power in right of war. It follows that the King must, directly or indirectly, be a party to all proceedings in a Court of Prize. In such a Court his position is in fact the same as in the ordinary Courts of the realm upon a petition of right which has been duly fiated. Rights based on sovereignty are waived and the Crown for most purposes accepts the position of an ordinary litigant. A Prize Court must of course deal judicially with all questions which come before it for determination, and it would be impossible for it to act judicially if it were bound to take its orders from one of the parties to the proceedings.

In the second place, the law which the Prize Court is to administer is not the national or, as it is sometimes called, the municipal law, but the law of nations — in other words, international law.

. . . . . .

It cannot of course be disputed that a Prize Court, like any other Court, is bound by the legislative enactments of its own sovereign State. A British Prize Court would certainly be bound by Acts of the Imperial Legislature. But it is none the less true that if the Imperial Legislature passed an Act, the provisions of which were inconsistent with the law of nations, the Prize Court, in giving effect to such provisions, would no longer be administering international law. It would in the field covered by such provisions be deprived of its proper function as a Prize Court. . . . The fact, however, that the Prize Courts in this country would be bound by Acts of the Imperial Legislature affords no ground for arguing that they are bound by the Executive Orders of the King in Council.

On July 7, 1916, three months after the decision of the Privy Council in the *Zamora* case, the Order-in-Council relied upon in the decision by the Prize Court in the *Kim* case, and all other Orders-in-Council then in force relating to the Declaration of London, were withdrawn by a new Order-in-Council. This order recites that this was done because "the issue of these successive Orders-in-Council may have given rise to some doubt as to the intention of His Majesty, and also as to that

of his allies, to act in strict accordance with the law of nations," and declares that it is and always has been their intention to exercise their rights in accordance with the laws of nations; and then it sets out a series of rules which are ordered to be observed, pointing out that this is done because, on account of the changed conditions of commerce and diversity of practice, doubts might have arisen as to the rules which they regard as being in conformity with the law of nations.

This Order-in-Council, like the previous ones, is not based on the authority of any specific powers conferred by act of Parliament upon the King in Council, and the rules set out in this order do not differ materially from the rules embodied in the previous orders, except that the new order does not refer to the Declaration of London. The new order does differ radically from the old orders, however, in its application to neutral rights, because it was adopted after the Privy Council decision in the *Zamora* case, and therefore must be read in the light of that decision, and also because the reason embodied in it, as above noted, explaining why it was adopted, shows that it has an entirely different purpose from that of the previous orders. As was recognized by the Privy Council in the *Zamora* case, if the rules adopted in an Order-in-Council conform to the law of nations, the order is quite unnecessary to give them effect, and if they conflict with the law of nations, the order cannot make them binding upon a prize court, so far as the rights of neutrals are concerned. This was not recognized by the British Government when the earlier orders were adopted. The *Zamora* decision made it clear, however, and so in this later order a special reason for its adoption was stated, namely, that the issue of the previous orders had given rise to doubts as to the intention of the British Government and their allies to act in strict accordance with the law of nations, and it was accordingly explained in the order that the rules which were then adopted were regarded by the British Government and their allies as being in conformity with that law. In the circumstances this amounts to a distinct recognition that these rules depend for their enforcement in the Prize Court, not upon their adoption by an Order-in-Council, but upon their conformity with the law of nations.

It is clear, therefore, that in accordance with the settled rule followed by the Privy Council in the *Zamora* case, this Order-in-Council

cannot detract from the established rights of neutrals under the law of nations, and in so far as the rules adopted by it are found to be in conflict with the law of nations, they will not be binding upon the Prize Court, and if followed by the Prize Court, the Government of the United States, as announced in its communication above quoted of July 14, 1915, "will not recognize the validity of prize court proceedings taken under restraints imposed by British municipal law in derogation of the rights of American citizens under international law."

It should be said in closing that in the negotiations for a settlement of the Packers cases, the British Government demonstrated their desire to deal justly and reasonably with questions of difference of a legal nature arising out of their interference with neutral trade under these Orders-in-Council, and when this last Order-in-Council was communicated to the Government of the United States, it was accompanied by a Foreign Office memorandum which closes with the following reassuring declaration:

> These successive modifications may perhaps have exposed the purpose of the allies to misconstruction; they have therefore come to the conclusion that they must confine themselves simply to applying the historic and admitted rules of the law of nations.
>
> The allies solemnly and unreservedly declare that the action of their warships, no less than the judgments of their prize courts, will continue to conform to these principles; that they will faithfully fulfill their engagements, and in particular will observe the terms of all international conventions regarding the laws of war; that mindful of the dictates of humanity, they repudiate utterly all thought of threatening the lives of non-combatants; that they will not without cause interfere with neutral property; and that if they should, by the action of their fleets, cause damage to the interests of any merchant acting in good faith, they will always be ready to consider his claims and to grant him such redress as may be due.

Taking into consideration the settlement of the Packers cases, and the decision of the Privy Council in the *Zamora* case, and the subsequent action taken by the British Government in regard to the Orders-in-Council relied upon in those cases, it would seem that the decision of the Prize Court in the Packers cases, although standing unreversed of record, can not fairly be taken as a basis, sanctioned by the British Government for the treatment of neutral commerce.

CHANDLER P. ANDERSON.

THE CASE OF THE "APPAM" AND THE LAW OF NATIONS [1]

At the time when the *Emden* and all other German ships had ended their careers on the high seas, and England thought herself safe from the inroads of German cruisers on the ocean, about the middle of January, 1916, the Liverpool liner *Appam* disappeared on a voyage from Dakar, West Africa, to Plymouth, England. This ship had left its port of departure on January 11th and was expected in Plymouth the 21st of that month. After four days, wireless communication with the vessel ceased suddenly, and as nothing was heard of the ship during the following days, it was given up for lost. It was admitted that it had either gone down in a severe storm which had been raging on the West African coast, or had been sunk by a German submarine which had extended its radius of action. These assumptions were confirmed by the British steamer *Tregantle*, which on the 16th of January passed a damaged life-boat having on its stern the name *Appam*. The risks on the *Appam* rose to 75% in London, and no hopes were had as to the fate of the passengers, among whom were the Governor of the British colony of Sierra Leone and his wife.

On the first of February, 1916, a ship entered the harbor of Norfolk, Virginia, which flew from its masthead the German battle flag. It was the *Appam*, now a German prize with a German prize crew on board. A German auxiliary cruiser, the *Moewe*, disguised as a tramp liner, sailed through the North Sea and on the very lanes of travel of English ships until she reached the high seas, where, unknown to the enemy, she preyed upon British merchant ships. Six larger vessels had been taken near the northwest African coast between the 11th and 13th of January, when the *Appam* appeared on the 15th of that month. The *Moewe*, disguised as a tramp, approached the British vessel, and when within range, the German battle flag rose on the *Moewe*, and the guns stood in position. The *Appam*, which possessed

[1] Translated from the German by Carlyle Reginald Barnett, of New York City.

only one three-inch gun, soon surrendered. The *Moewe* placed 138 people whom she had taken off destroyed prizes, as well as a prize crew of 22 men under the command of Lieutenant Berg, on board the *Appam*, and with these and 20 other Germans who had been captured in Africa and were being taken to detention camps in England, the *Appam* was taken across the Atlantic Ocean, a voyage of 3400 miles, without being seen by the British cruisers engaged in patrolling the Atlantic coast of the United States. Thus, on February first, the *Appam*, under the guidance of 42 Germans, with some 400 Englishmen, sailed into Norfolk harbor, flying the German flag.

The case of the *Appam* attracted notice not only because of the unheard of boldness which caused this British ship to be taken as a German prize into an American harbor, but also because of the complicated legal questions which stamped this as one of the most remarkable cases of international law. The matter became more involved because of the efforts of the British Government and the former English owners to regain possession of the *Appam*. The British Government sought to attain its end through diplomatic channels and asked, through its Ambassador at Washington, that the American Government should free the ship, return the *Appam* to England, and intern the German prize crew on the basis of Article 21 of the XIII Hague Convention of 1907. The former English owners, the Elder Dempster Company, Ltd., and the parent line of this company, the British and African Steam Navigation Company of London, instituted legal proceedings, and a libel was filed in the United States District Court at Norfolk, Va.[2]

Without entering into any criticism of the conduct of the American Government in regard to the British diplomatic action, or of the District Court on the commencement of legal proceedings in regard to the *Appam*, an objective consideration of the case assumes various aspects, which will be discussed in detail in the following pages.

I

As is well known, efforts have been made in recent times to improve the existing chaotic conditions of international public maritime law

[2] Since this article was written, this case has been decided by the Supreme Court of the United States, which has ordered the *Appam* returned to her British owners. The decision is printed *infra*, p. 443. — Ed.

which boasts of but very few generally recognized rules. To this end, a series of legal rules in more or less codified form were agreed upon at the Hague Peace Conferences of 1899 and 1907, the last in particular, and at the London Naval Conference of 1908–9. If these had been recognized and obeyed in place of the former imperfect body of maritime law, they would have made a most important series of legal principles covering the law of the sea. These agreements, however, as between sovereign states, do not become valid and binding by a majority vote of the conferences, but are only valid as to those states which submit to them by means of an international declaration with the Netherlands as "Trustee" for the Hague Conventions, and with Great Britain as "Trustee" for the London Naval Convention, and only then when all belligerent nations are parties to the compact. The XIII Convention of the Second Hague Conference of October 18, 1907, contains the following in Articles 28–30, in reference to the rights of neutrals in case of a naval war: The stipulations of this agreement are to hold good only as to the parties thereto and then only finds acceptance if all the Powers engaged in war are parties to it, and that ratifications of the same are deposited with the Government of the Netherlands at the Hague; and Powers that have not signed the agreement can accede to the same by official notice to the Government of the Netherlands with a declaration of accession annexed to the same.

As is well known, the English Government had not up to the beginning of the present war ratified the provisions of the London Naval Convention which gathered at the call of the British Government, so that as far as this war is concerned, they are not applicable. Also by a later, though only a partial ratification, and then not in the proper form, England could not obtain international recognition of the Declaration of London in the face of Article 65, which stated that the provisions of the Declaration must be treated as a whole and could not be accepted in parts. The XIII Convention of the Second Hague Conference has not, on the other hand, ever been ratified or in any other way been recognized by the British Government. England has not accepted this convention, because there must first be a change in English municipal law in order to bring it in accord with these international principles. But when the House of Lords rejected the Lon-

don Declaration which had been confirmed by the Commons, it became apparent that Great Britain did not desire to embark on a course of international legislation, but rather to regard international questions solely from an English point of view. The failure of the American proposal made at the beginning of the war for a general recognition of the London Declaration so that maritime law should have a definite status during the progress of the war, may be ascribed to the same reason.

In so far as rules are concerned, those contained in the declaration and convention referred to can only be recognized as rules of law to he degree that they were looked upon as such previous to the inception of the said declaration and convention. As far as the *Appam* case is concerned, only a very few of those provisions are recognized internationally. On the contrary, one finds almost everywhere opposing principles of national law and particularly international law, especially, the divergent views of the Anglo-American and Continental European systems. The Anglo-American conception is peculiar in that it is inclined to take its version as the standard and have the other nations recognize such as the true rule.

The claim of the British Government on the United States in regard to the *Appam* case is founded on the position of the latter as a neutral and its duties as such toward prizes of war taken into American harbors. The XIII Convention of the Second Hague Conference contains detailed provisions in Articles 21–26 for such a case, but, as has been shown above, these can only be regarded as proposals *de lege ferenda*. These interesting questions have not been touched upon in the Declaration of London, and as the mentioned regulations of the Hague Convention have been rejected as rules of international law, it is unnecessary to discuss here how far these intended general provisions take precedence or make way for particular international law, as they are only to be considered as valid if agreed upon between individual nations.

There was no generally recognized law of prize in international law. The treaty between the United States and Germany made provision for this discrepancy. According to international law, a neutral nation could either permit a warship to bring her prizes into port or refuse admittance. In the absence of an express prohibition, permission to

enter was implied.[3] Once in the harbor, a neutral state could limit the stay of such warships and prizes. Failure to set a time limit implied a right of indefinite asylum. Private vessels of belligerent ownership could remain any length of time in neutral ports, but it became customary to place a limitation on warships, although such procedure was not generally recognized. This time limit could be modified or completely disregarded by treaties between individual states. In such treaties, which were quite numerous in the eighteenth century, the high contracting parties mutually promised each other not only to receive into their ports prizes of the other, but also to refuse such a right to enemies of the several parties to the agreement.

This took place in the Franco-American Treaty of 1778 (Art. 19),[4] to be considered hereafter. On the other hand, the time limit set on reception took its inception from the limitation placed on prizes taken into port by privateers which, according to the French law, in case of distress at sea or evasion of one's enemy, was limited to 24 hours.[5]

Similar treatment was accorded a prize either when entering a neutral harbor in charge of a prize crew or accompanied by a warship. In the latter case the regulations for the stay of prizes were also applied to the escorting warship. Both were, therefore, placed on the same footing. It is quite apparent that this question and the course of conduct in the individual case depended entirely upon the presence of the prize. Westlake gives as a reason for the irregular treatment of prizes and warships, that conflicts on board the prize between the prize crew and the crew of the ship and, in the case where the ship was taken into port by a warship, fear of a conflict between the two ships, entitled a neutral country to refuse entrance of prizes to its harbors.

The continued possession of prizes, while in a neutral harbor, also implied the use of force over the captured crew. The neutral state, according to prevailing legal conceptions, could not interfere with this possession without placing itself in opposition to the principle of the

[3] Wheaton, Elements of International Law, 2d ed. by Lawrence, p. 726; Hall, A Treatise on International Law, 5th ed., p. 985.

[4] Wehberg, *Seekriegsrecht*, Handbuch des Völkerrechts, Vol. 4, p. 441; Moore, Digest, Vol. 5, sec. 821, p. 588; Wheaton, Elements, pp. 490 (note 165), 711.

[5] Westlake, International Law, Part 2, p. 214.

exterritoriality of prizes, and the use of force between warring Powers could not, on theory, be permitted in neutral waters.[6]

Perhaps the maritime rule of 24 hours for warships getting the start of other warships upon departure from a harbor was derived from the 24-hour rule for prizes, namely, that a certain time must elapse before a belligerent warship might leave a neutral port to pursue another belligerent warship which had previously left the same port. However, there has been no unanimity of opinion reached on this even to the present time. The Continental, and, in particular, the old French principles of law were directly opposed to the English rules on the question.

According to the French law, a neutral Power had the right to allow the warships of a nation engaged in war to remain an unlimited time within its harbors, a rule which France adhered to constantly.[7] This is evident from her conduct in the Russo-Japanese War. The Russian fleet, which had no prizes, was not limited as to any time while in French ports. Therefore, the French law remained as before, setting a time limit of 24 hours only on warships accompanied by prizes; the stay of warships without prizes was not limited to any prescribed period.

In opposition to this there prevailed, according to the English principle, a limitation on departure of twenty-four hours for warships of Powers at war. This rule was applied by England toward Russia in the Russo-Japanese War, in direct opposition to the conduct of France on the matter.

Warships with prizes, as likewise prizes alone, were, according to this principle, refused admittance to neutral harbors, except in the case of distress at sea.[8] Spain and Brazil followed the English rule, whereas Italy, the Netherlands, Belgium, Denmark and Japan favored the French rule.[9] Therefore there could be no question at the Hague Conferences of a universal principle of international law as regards the stay of warships or prizes, with or without escort, in harbors of neutral nations. The overwhelming rule, however, and in fact the representative American principle, was that in case of no prohibition warships

[6] Westlake, International Law, Part 2, pp. 213–214.
[7] *Ibid.*, p. 213. [8] *Ibid.*, p. 214. [9] *Ibid.*, p. 214.

could send their prizes to neutral ports. This became the legal American rule in the Bergen Prize Cases with Denmark in which Mr. Wheaton in 1843 said, in a note to the Secretary of State:

> If then there was an express prohibition in this case, and if there was no treaty existing between Denmark and Great Britain by which the former was bound to refuse to the enemies of the latter these privileges (and I suppose there was no such prohibition or treaty), then the American cruisers had an unquestionable right to send their prizes into Danish ports. . . . When once arrived there, the neutral government of Denmark was bound to respect the military right of possession, lawfully acquired in war by the captors on the high seas and continued in the neutral port into which the prize was brought.[10]

As is seen, Wheaton made no distinction whether the warship brought the prize into a neutral port or whether the prize was brought to a neutral port manned by a prize crew from the captor vessel. Likewise, he considers the application to this case of the Franco-American treaty of 1778 which in Article 19 uses the expression "carry into the ports," and he declares that France thereby obtained the following rights against America: (1) *Admission for her prizes* and privateers (exclusively); (2) admission for her public vessels of war into our ports, in case of stress of weather to refresh, victual, repair (not exclusively).[11]

The prize, as such, is to be granted admittance and the manner in which she is carried into port depends solely on the military discretion of the captor. The right of admission is different for prizes and for warships. Attorney General Cushing, in an opinion rendered in 1855, declared that the right of asylum is presumed where it has not been previously denied.[12]

In the case of the Schooner *Exchange* (1812), in which the principle of exterritoriality of foreign warships was first given general recognition in the United States, Chief Justice Marshall said:

> In the absence of any prohibition, the ports of a friendly nation are considered as open to the public ships of all Powers with whom it is at peace, and they are supposed to enter such ports and to remain in them while allowed to remain, under the protection of the government of the place.[13]

[10] Moore, Vol. 7, sec. 1314, pp. 982–983.
[11] *Ibid.*, pp. 982–983.
[12] *Ibid.*, p. 985.
[13] Moore, Vol. 2, Sec. 254, p. 576.

The literature on the subject of prizes was not unanimous. On one hand it allowed complete unlimited stay;, while on the other hand, admittance was only to be had in case of distress at sea. Even the members of the Institute of International Law have uttered the most diversified opinions in regard to this matter.[14]

In so far as it is a question of the present state of the law, it may be said that, according to the general conception of writers, in the absence of positive prohibition, warships and their prizes have the right to enter neutral ports and there find shelter and asylum.[15] Although a neutral must treat all belligerents impartially during the continuance of such a prohibition, it is deemed permissible to grant a nation by a treaty made previous to a war the right of asylum in a neutral port, and in the same way a treaty may be concluded to deny such a right to whatever nation might be at war with one of the contracting parties.[16] Such a different treatment of belligerents, in regard to the bringing in of prizes, was provided in Art. 19 of the treaty of 1778 between France and America, as has already been mentioned.[17]

In short, during the period between the seventeenth and nineteenth centuries, all disadvantages and restraints attending the entrance of prizes into neutral ports were applied to warships accompanying these prizes. The first and decisive feature was the presence of the prize which, if granted little or no period of stay in port, communicated similar limitations to warships which accompanied such prizes.

[14] Wehberg, *ibid.*, p. 441; *Annuaire de l'Institut*, Vol. XXIII, pp. 86, 87, 136, 143, 148, 156, 166 ff.; Wheaton, pp. 725–726, note 1 on p. 726.

[15] Hall, p. 642; Wheaton, p. 197; "If, for reasons of state, the ports of a nation generally, or any particular ports, be closed against vessels of war generally, or against the vessels of any particular nation, notice is usually given of such determination. If there be no prohibition, the ports of a friendly nation are considered as open to the public ships of all powers with whom it is at peace, and they are supposed to enter such ports, and to remain in them while allowed to remain, under the protection of the government of the place. If there be no treaty applicable to the case, and the sovereign from motives deemed adequate by himself permits his ports to remain open to the public ships of friendly Powers, the conclusion seems irresistible that they enter by his assent. And if they enter by his assent necessarily implied, no just reason is perceived for distinguishing their case from that of vessels which enter by express assent." See Vattel, *Droit des Gens*, liv. IV, ch. 7 sec. 12.

[16] Wheaton, p. 726.

[17] Wheaton, p. 490 (note 165), 711; Moore, Vol. V, sec. 821, p. 588.

As the right of neutral states to refuse entrance to their harbors to prizes of belligerents, whether accompanied by warships or not, was recognized if there was no treaty holding the contrary between the parties, it became necessary for each state, in order to secure the right of asylum in foreign states, as well as the exclusion of those of a possible enemy, to enter into a treaty to that effect similar to the treaty between France and America of 1778. Accordingly, all international treaties of that time with reference to rights on the high seas contain an agreement in regard to the bringing in of prizes, and partly as an exclusive privilege, as in the exclusion of the future opponent in the Franco-American Treaty of 1778, partly as a simple privilege, as in the Prussian-American Treaty of 1799. Certain definite provisions of this convention are embodied in the later treaty of May 1, 1828, and bind both the German Empire and the United States. The stipulations of both the French and Prussian treaties are in other respects, as we shall see, similar, even to the very phrasing of the two.

The right to take the prize into harbor manned by a prize crew was comprehended under the right to take such a prize into a neutral harbor, as it was entirely within the power of the captor to decide according to military necessities whether he should send the prize in in charge of a prize crew or convoy it himself, and it was understood that the decision of this purely military question was entirely out of the sphere of the neutral state into whose harbor the prize was to be brought.

The general opinion which Wheaton, as already mentioned, considered undisputed was that prizes could be taken in by a prize crew and need not be accompanied by the warship. This opinion the American Government acted upon in instructions to its warships in its last great naval war with England in 1812. All enemy prizes, except in extraordinary cases, were ordered to be destroyed and were not to be sent to a friendly port, for the reason that the delegation of a prize crew to take the prize into a harbor would decrease the fighting force of the captor and thus weaken the offensive and defensive strength against the enemy, and because the destruction of the enemy's commerce to the greatest extent possible was the object of naval warfare.[18]

[18] Hall, p. 475: "Therefore, unless your prizes should be very valuable and near a friendly port, it will be imprudent and worse than useless to attempt to send

In instructions of June 5, 1813, to Lieutenant Allen of the *Argus*, it was stated:

> Indeed, in the present state of the enemy's force, there are very few cases that would justify the *manning* of a prize, because the chances of reaching a safe port are infinitely against the attempt, and the weakening of the crew of the *Argus* might expose you to an unequal contest with the enemy.[19]

In instructions of the 19th of September, 1813, to Captain Charles Stewart of the *Constitution*, it was declared:

> The destruction of the commerce of the enemy is the main object. . . . Therefore, unless your prizes shall be very valuable and near a friendly port, it will be imprudent and worse than useless to attempt *to send them in*. . . . The crew and safety of the ship under your command *would be diminished and endangered* . . . by hazarding a battle after the reduction of your officers and crew by *manning prizes*.[20]

In instructions to Commander George Parker of the *Siren* of December 8, 1813, it was stated:

> A single cruiser, if ever so successful, *can man but a few prizes*, and every prize is a serious diminution of her own force, but a single cruiser, destroying every captured vessel, has the capacity of continuing in her full vigor her destructive power so long as her provisions and stores can be replenished. . . . Thus has a single ship upon the destructive plan, the power perhaps of twenty, acting upon pecuniary views alone; and thus must the employment of our small forces in some degree compensate for the great inequality compared with that of the enemy.[21]

Similar instructions were given to other commanders on December 22, 1813, January 6, February 26, March 3, and November 30, 1814.[22-23] The result of these general instructions was the destruction of more than 74 British merchant ships.[24]

The English law (Art. 303 Naval Prize Law), as well as the American law (Art. 50 Naval Code), unanimously justify the destruction of an enemy prize if the captor warship is not in a position to place a prize crew on board to bring her into port for adjudication.[25] Also French

them in. A single cruiser, if ever so successful, can man but few prizes, and every prize is a serious diminution of her force. . . ."

[19] Moore, Vol. 7, sec. 1212, p. 516.
[20] *Ibid.*, p. 516.
[21] *Ibid.*, p. 517.
[22] *Ibid.*, p. 517.
[23] *Ibid.*, pp. 516–517.
[24] Hall, p. 475.
[25] Wehberg, p. 398.

and English legal practice, although not permitting the general destruction of enemy shipping, considers such destruction as proper, if placing a prize crew on board the captured ship to take her into port would so weaken the captor vessel that its further operations in the course of duty would be hindered,[26] and also if the captor ship itself could not convey the prize to port. Lord Stowell says in the case of the *Felicity:*

> The captors fully justify themselves to the law of their own country which *prescribes the bringing in,* by showing that the immediate service in which they were engaged, that of watching the enemy's ship of war, the *President,* with intent to encounter her, though of inferior force, would not permit them to *part with any of their own crew to carry her into a British port.* Under this collision of duties nothing was left but to destroy her, for they could not, consistently with their general duty to their own country, or indeed its express injunctions, permit enemy's property to sail away unmolested. If impossible to bring in, their next duty is to destroy enemy's property. (2 Dodson, 383.)[27]

This position, which clearly maintains that the captor cannot be required to delegate a prize crew to take the prize into a home port, is especially worthy of note, because in describing the manner of taking a prize in, the English expression is the same as the one used in the aforementioned Franco-American and Prussian-American treaties, namely, the word "carry."

Before discussing the last mentioned treaty, it must be said that its provisions do not clash with any of the neutrality proclamations of the United States, from which one can indirectly imply the recognition of the binding force of the contents of the treaty by the Government of the United States. During the last 50 years there have been the neutrality proclamation of President Grant of October 8, 1870, at the time of the Franco-Prussian War,[28] the neutrality proclamation of President Roosevelt of February 11, 1904, at the outbreak of the Russo-Japanese War;[29] and the neutrality proclamation of President Wilson of August 5, 1914, at the beginning of the present war.[30] In all these proclamations there are similar announcements which permit the

[26] Hall, p. 476, note 1.

[27] Hall, p. 476, note 1; Roscoe, Reports of Prize Cases from 1745 to 1859, Vol. II, pp. 235–6.

[28] Moore, Vol. 7, sec. 1315, pp. 987–989.

[29] *Ibid.*, p. 989.

[30] Stockton, Outlines of International Law (1914), Appendix V, pp. 598–601.

stay in neutral ports of belligerents' warships for a period not to exceed twenty-four hours. No prohibition of the bringing in of prizes alone, or under convoy, is mentioned in any of these proclamations. From the above statements and from the past conduct of the United States, this seems to imply that this country is not opposed to the bringing in of prizes into American ports and that the provisions of the Prussian-American Treaty of 1799, in so far as they are reënacted in the treaty of 1828, are still binding on both nations.

That this first treaty between Prussia and America is now binding upon the German Empire, as the successor of Prussia, and upon the United States, is generally acknowledged. This recognition was repeatedly expressed by the participating parties to the treaty. On the outbreak of the American Civil War the Prussian Minister of Commerce issued, on August 16, 1861, to the Chambers of Commerce of Prussia, a circular letter, in which it was clearly announced that this treaty was still binding on the parties.[31] During the Franco-Prussian War the American Government made reference to certain protectory provisions for American shipping in the treaty of 1799 and of 1828 with Prussia and the newly founded German Empire. In answer Count Bismarck, the Chancellor of the new empire, by a telegram of February 9, 1871, recognized these provisions of the treaty as binding and subsisting between the American Government and the German Empire.[32] The validity of the treaty in regard to the German Empire as the successor of Prussia was later officially recognized both on the part of Germany and the United States. The United States had this treaty included among those compiled and printed as official documents in the collection known as "Compilation of Treaties in Force." Germany, through the Chancellor, at a session of the Reichstag of February 11, 1899, gave express recognition to the treaty.[33]

The Treaty of 1828 declares (Art. XII) that Article 12 of the Treaty of 1785, famous as the treaty of amity and commerce concluded with Frederick the Great, as well as Articles 13–24 of the Treaty of 1799,

[31] Niemeyer, *Internationales Seekriegsrecht*, Part II, *Urkundbuch zum Seekriegsrecht*, Vol. I, p. 22.

[32] Moore, Vol. 7, sec. 1198, pp. 498–499; Niemeyer, *op. cit.*

[33] Niemeyer, p. 22.

with the exception of the last phrase of Article 19, should be reënacted in so far as no conflicting treaties had been concluded with other nations. Article XIX of the Treaty of 1799, which is still in force, reads as follows:

> The ships of war, public and private, of both parties, shall carry freely, wheresoever they please, the vessels and effects taken from their enemies, without being obliged to pay any duties, charges or fees to officers of admiralty, of the customs, or any others; nor shall such prizes be arrested, searched or put under legal process when they come to and enter the ports of the other party, but may freely be carried again at any time by their captors to the places expressed in their commissions, which the commanding officer shall be obliged to show.

The last clause of this article concerned the Jay Treaty of 1794, which was abrogated by the War of 1812. Because of changed conditions the clause was never reënacted. It read as follows:

> But conformably to the treaties existing between the United States and Great Britain, no vessel that shall have made a prize upon British subjects, shall have a right to shelter in the ports of the United States, but if forced therein by tempests, or any other danger or accident of the sea, they shall be obliged to depart as soon as possible.[34]

It is quite apparent that if it had not been for the intervention of the War of 1812, the *Appam*, a prize taken from Englishmen, would have come under the head of this last clause and would have been deprived of the protection of the other part of Article 19.

On the basis of that part of Article XIX still in force, the *Appam*, as a German prize, had the right to enter Norfolk harbor and remain there as long as the commander thought proper. The meaning of Article 19 is apparent from our previous discussions. The purpose of this stipulation was to grant to either contracting party the right to bring prizes into the harbors of the other, to lay them up there and to prevent the exercise of the right to exclude prizes or limit their stay as recognized by the law of nations. The way in which the prize is to be brought into harbor is not stipulated in this article, but is left to the option of the commander, who decides whether the prize is to be brought in under convoy or by a prize crew. If bringing the prize in under convoy is the only possible way, as England now insists,

[34] Niemeyer, p. 30.

it is self-evident that this modification of the general rule would have to be expressed in plain words. This article, however, contains no such exceptional stipulation, but on the contrary declares that warships have the right to enter, together with their prizes, in case the other contracting party as a neutral should make use of the right accorded it by international law and forbid or limit the time during which warships of belligerents could remain within its harbors.

As far as the prize itself is concerned, the general expression "come to and enter the ports" clearly shows that the entrance of such a prize, irrespective of the manner in which she is brought into the neutral harbor, should not be hindered in any way. "Carry" means, as has been previously stated, the relation of the prize to the convoying warship, and was, as has also been stated, the generally accepted term for the various ways of designating the bringing in of a prize by a warship. It is necessary at this point to refer to the use of this word in the Franco-American Treaty of 1778 and in the decision of Lord Stowell in the case of the *Felicity*. A comparison of Article XVII of the Treaty of 1778 with Article XIX of the Treaty of 1799 shows nearly an exact repetition of the former article, except that part which concerns the exclusion of prizes of an opponent of the other contracting party, which is not discussed. There it is also stipulated that "the ships of war and privateers of either party might in time of war freely carry their prizes into the ports of the other party"; that such prizes, when so brought in should not be subject to "search" or to "examination" as to their "lawfulness"; but that they might be taken away "at any time to the places expressed in the commission of their captors, which commissions the commanding officer of such vessel shall be obliged to show." Lord Stowell's decision containing the same expressions to designate the form and manner of bringing a prize into port has already been cited.

The next consideration is whether the *Appam* presents a case of a prize contemplated by the Treaty of 1799. The treaty gives no indication as to what constitutes a prize, but, like the Treaty of 1778, restrains, on the other hand, the courts of the state granting asylum from examining the legality of the capture. In this respect the Treaty of 1799 says, "nor shall such prizes be arrested, searched, or put under legal

process," while the treaty with France of 1778 declares, "nor shall the searchers or other officers of those places search the same, or make examination concerning the lawfulness of such prizes." The outward indications of the capture suffice, namely, possession, and the national flag of the captor on the prize, which, when the seizure is made by a warship, gives military possession to the nation of the captor. The flag, especially, gives the prize the character of a ship which has always belonged to the captor so far as the reception in a neutral harbor is concerned.[35] Upon the capture of a ship that belongs to the subject of an enemy state both possession and title is immediately transferred to the captor state,[36] a rule of law which has always been recognized by the American courts.[37] This is so stated in a review which Wheaton makes in one of his volumes on Judge Story's decisions in regard to American prize law at the time of the War of 1812: "As between captor and captured, the property is divested instantly on capture." This, in its application to the question of the transfer of title, is founded on appropriation and continuous possession by the captor warship as a military act in behalf of the state. The result is that the prize, by reason of its military character, assumes the status of a public vessel of the captor state, and is in the same class as war ships. In regard to this question there is not the least doubt in theory nor in practice. Wheaton, who was the representative of America in the Bergen controversy with Denmark, says in a despatch of November 10, 1843, to the Secretary of State:

> When once arrived there (the ports of Denmark), the neutral Government of Denmark was bound to respect the *military right of possession* lawfully acquired in war by the captors on the high seas and continued in the neutral port into which the prize was brought.[38]

Wheaton says in his Elements of International Law, in reference to contemporary, particularly American, literature:

> And though the prize was in fact within a neutral jurisdiction, it was still to be considered as under the control of the captor, whose possession is considered as that *of his sovereign*.[39]

[35] Westlake, Vol. II, p. 213. [36] Wehberg, p. 316. [37] Wheaton, p. 972.
[38] Moore, Vol. 7, sec. 1314, pp. 982–983; Wheaton, p. 42 (note).
[39] *Ibid.*, p. 671, and note 1.

Lawrence, in his edition of Wheaton, Appendix 4, cites on this question the Danish jurist Tetens, who, referring to the maritime ordinances of Louis XIV of 1681, under which the limitation on the admission of prizes was first enacted, says of the instance where extraordinary permission may be given to bring in prizes:

> The captor, who avails himself of such a permission, does not thereby lose *the military possession of the captured property*, which gives to the prize courts of his own country exclusive jurisdiction to determine the lawfulness of the capture.[40]

According to these authorities, it is quite apparent that every prize of a war vessel under the command of a duly accredited officer has the right of exterritoriality. Accordingly, Moore, citing the opinion of Cushing, Attorney General of the United States, on the question of an English warship which brought a Russian prize into San Francisco harbor during the Crimean War, says:

> A foreign ship of war, *or any prize of hers*, in command of a public officer, possesses in the ports of the United States the right of *exterritoriality*, and is not subject *to the local jurisdiction*.[41]

To the same effect is a decision of the English Court of Appeals, cited by Moore, and referred to hereinafter, p. 294.[42] This case is likewise cited with approval by Wheaton.[43]

The leading case in American prize law upon the right of exterritoriality in foreign warships which firmly imbedded this rule in American jurisprudence, was that of the Schooner *Exchange*, decided by Chief Justice Marshall in the year 1812. This case once and for all settles the law for the United States.[44]

To establish military possession of the prize, it is sufficient, as Hall remarks, if each transaction designed by the captor to effect possession and retain it can be carried out with sufficient certainty, but at all events a prize crew must be placed on board,[45] which was done in the case of the *Appam*. It was formerly a question whether to constitute possession the captured vessel had to be retained for at least twenty-four hours or brought *infra præsidia*, namely, into a home port or into a place where the prize would be safe from recapture, but this question

[40] Wheaton, p. 962.
[41] Moore, Vol. 2, sec. 254, p. 578.
[42] Moore, Vol. 2, p. 591.
[43] Wheaton, p. 726, note 1.
[44] *Ibid.*, pp. 575–577.
[45] Hall, p. 473.

has now receded into the background.[46] Both of these provisions were fulfilled in the case of the *Appam*, as the facts clearly prove, for the English fleet did not succeed in recapturing the ship previous to its entry into Norfolk harbor.

When the *Appam* entered Norfolk harbor, she came in as the prize of a German warship, under the protection of her right of exterritoriality, in so far as the laws and courts of the United States were concerned, and under the right of asylum granted by the Treaties of 1799 and 1828. It naturally follows from the foregoing statements that in such a case the government of the state to which the prize previously belonged has no claims as of right against the neutral state, either for the restitution or the expulsion of the prize. In regard to the question of a refusal to admit the prize, the discussion concerns only existing right, and not any subsequent obligatory *duty*. Neutral duties exist only in so far as a belligerent Power is injured by a failure to perform them, which failure gives rise to a claim against the neutral state. The previous discussion of the existing state of the law has proved that it is within the pleasure of every neutral to determine what course it will pursue in regard to prizes. A breach of neutrality occurs only when the capture of the prize may be regarded as illegal by the neutral state, namely, when the vessel was taken in violation of the duties imposed on the neutral nation.

So far as the situation between the belligerents is concerned, the question of a violation of neutrality cannot arise, as no infringement of neutrality invalidates the capture of the prize.[47] In this respect there is a unanimity of opinion that the neutral state has the right to interfere only in the following cases: (1) When the prize was taken within the territorial waters or boundaries of the neutral state and the neutrality of that state was in that way violated; (2) when the prize was taken by an armed ship which was either fitted out within the neutral state, or which had, contrary to the rules of neutrality, strengthened her armament within such territory.[48] A third instance, which is

[46] Hall, pp. 472–473; Wheaton, p. 653; Westlake, Part 2, p. 156.

[47] Westlake, part 2, p. 519; Hall, p. 645, note 2, *The Anne*, 3 Wheaton, 446.

[48] Moore, Vol. 2, sec. 254, p. 580; Wheaton, pp. 208, 671, 722; Westlake, Part 2, p. 216; Hall, pp. 644–645.

not recognized everywhere, is where the prize belongs to citizens of the neutral state and was captured in violation of the rules of international law.[49]

The first two cases involve a direct violation of the sovereignty of the neutral state, and in both these instances a duty is imposed on the neutral nation to undo the wrong. It is sufficient to refer here to two cases in connection with these principles; the *Santissima Trinidad* and the *Amistad de Rues*, both decided by the Supreme Court of the United States.

The case of the *Santissima Trinidad* concerned a Spanish ship, captured by armed vessels of insurgents against Spanish rule, who were recognized by the United States as belligerents and who had received a "commission" from the so-called "United States of the Rio de la Plata." [50] These ships were equipped for privateering within the ports of the United States and in violation of the neutrality of that nation. It involved a question very similar to that in the Alabama claims, with the exception that here the United States assumed the opposite rôle, namely, that of the party at fault. The Supreme Court of the United States decided that:

> The exemption of foreign public ships, coming into the waters of a neutral state, from the local jurisdiction, does not extend to their prize ships, or goods captured by armaments fitted in its ports, in violation of its neutrality. . . . The tacit permission, in virtue of which the ships of war of a friendly Power are exempt from the jurisdiction of the country, cannot be so interpreted as to authorize them to violate the rights of sovereignty of the state, by committing acts of hostility against other nations, with an armament supplied in the ports where they seek an asylum.

The court ordered the captured goods to be restored to the Spanish owner.[51]

The case of the *Amistad de Rues* dealt with a Spanish ship which was captured by a Venezuelan privateer and taken as prize to New Orleans. In this case it was also insisted that the privateer had augmented its fighting force within the United States and that a violation of neutrality had thereby been committed. The United States Supreme

[49] Wheaton, pp. 671, 725.

[50] *Ibid.*, p. 975.

[51] Wheaton, p. 208; Moore, Vol. 2, sec. 254, p. 581; Hall, p. 645, note 2.

Court, through Judge Story, gave expression to the same principles that have previously been discussed. Hall says in this regard:

> When a vessel is brought or voluntarily comes *infra praesidia* of a neutral Power, that Power has the right to inquire whether its own neutrality has been violated by the capture, and if so it is bound to restore the property.[52]

We shall refer to both these cases again when we take up the discussion under II, particularly regarding the recovery of possession of property according to regulated proceedings.

In the case of the Bergen Prizes between the United States and Denmark, this country even in the absence of a treaty asserted the same privileges that Germany now maintains in the case of the *Appam*. This case involved three British ships which were captured by the *Alliance*, commanded by Captain Landais, one of the vessels of the American fleet commanded by John Paul Jones, and brought into Bergen, Norway, at that time belonging to Denmark. Upon the request of the British Government, the Danish authorities seized the ships and returned them to England, ostensibly because Denmark had not yet recognized the independence of the United States, and the prizes, therefore, could not be considered legal. The United States took the case up immediately and Franklin requested that the order of restitution of the prizes should be withdrawn or, if it had already been carried out, that their value, which was placed by him at £50,000, should be paid by Denmark to the United States. The Minister, Count Bernstorff, replied evasively without questioning the rights of the United States as a belligerent, and pointed out, as an excuse for the order, the geographical position of England and Denmark, which placed the latter in a position of constraint in matters concerning the former. In the course of negotiations which at the time were being carried on at Paris, the Danish diplomatic representative in Paris, in order to justify the Danish decree, referred to an alleged treaty between Denmark and England, which, however, was never produced. The Danish Government finally offered a certain sum of money as indemnity, which amounted to an acknowledgment of international liability and at the same time a recognition of the justice of the position of the

[52] Hall, p. 645, with other cases.

United States. This sum of money was not considered sufficient by the United States and the offer was refused. The claim against Denmark has been continued and maintained by the United States up to the present time, especially in the negotiations with Denmark in the years 1812 and 1843. Wheaton, who represented the United States in the latter year, in a despatch to the Secretary of State of November 10, 1843, said:

> In the absence of any treaty with England to exclude the prizes of her enemy and of previous prohibition to the United States, by either of which means their prizes might have been refused admission without any violation of neutrality, the United States had a right to presume the assent of Denmark to send them into her ports.

He added:

> There was no ground for the application of the *jus postliminii*, which could only take place between subjects of the same state or allies in the war, a neutral state having only a right to interfere to deprive the captor of his possession when the capture has been made in violation of neutral sovereignty, within the limits of a neutral state, or by a vessel equipped there.

In spite of the fact that the United States could not bring about the payment of the indemnity through diplomatic channels, the Government and Congress stood firmly by the position which the United States had assumed in the controversy, and laws were passed which appropriated the requisite prize money to the officers and crews entitled to the same, on the ground that the prizes were legally captured, and as if the indemnity had been paid by Denmark. (Laws of 1806 and 1848, Resolution of 1861.) [53]

Throughout the whole of the negotiations concerning the Bergen Prizes, the Government of the United States [54] maintained the position that a neutral state had no right to interfere with prizes which had been brought into its harbors if neither a breach of sovereignty nor of neutrality had taken place. The justice of this rule of law was also

[53] Wheaton, notes on pages 41 and 42; Moore, Vol. 2, sec. 1076–1078, Vol. 7, sec. 1314, pp. 982–983.

[54] According to Resolutions of the Committee on Foreign Affairs of the Senate for 1820, and of the House of Representatives for 1837, the last on a report of the Secretary of State. H. Rep. 2d Sess., 23d Congress, Vol. 2, p. 389; 2d Sess., 24th Cong., Vol. 2, p. 297; Wheaton, Elements, p. 42.

admitted by Denmark because she sought to justify her action to the contrary by pleading a special treaty with Great Britain and claiming that she was bound by particular rather than by general international law.

In the case of the *Appam* the American Government is bound by the course of conduct which it formerly pursued, especially since in view of the circumstances of the *Appam* case the exceptions to the rule do not apply, nor have they even been advanced by the British Government.

Finally, it may be pointed out that the United States has itself applied these fundamental rules within its own dominions in the case of the British prize, previously mentioned, namely, the Russian ship *Sitka*, which was brought into San Francisco harbor during the Crimean War under control of a British prize crew as the prize of a British warship. This case, as regards outward circumstances, corresponds to the case of the *Appam* in every detail. At that time a judge of a local court of California issued a writ of *habeas corpus* to test the legality of keeping the Russian crew of the prize prisoners within an American harbor. In the case of the *Appam* the British crews were likewise kept prisoners on board by the German prize crew, and their release, as in the case of the *Sitka*, was refused by the captor commander.

In the case of the *Sitka*, the English commander sailed away with ship and prisoners without paying any attention to the judicial order, and thus left the jurisdiction of the State of California. Upon complaint of the Governor of California to the President of the United States as "for a public wrong to the judicial and political authorities of the State," the Federal Government, which was in doubt as to whether a cause of complaint existed against England, requested the Attorney General of the United States for an opinion on the question, and he replied as follows:

> I cannot say that, in my opinion, it was the duty of the commander of the *Sitka* to remain in port to answer to the (order?) of a court having no jurisdiction of the issue; especially if there was any danger of his lawful prisoners being taken away from his custody by such process.
>
> Belligerent ships of war, privateers, and the prizes of either, are entitled, on the score of humanity, to temporary refuge in neutral

waters from the casualties of the seas and war. By the law of nations, belligerent ships of war, with their prizes, enjoy asylum in neutral ports, for the purpose of obtaining supplies or undergoing repairs according to the discretion of the neutral sovereign, who may refuse the asylum absolutely, or grant it under such conditions of duration, place and other circumstances, as he shall see fit, provided that he must be strictly impartial in this respect towards all the belligerent Powers. Where the neutral state has not signified its determination to refuse the privilege of asylum to belligerent ships of war, privateers or their prizes, either has a right to assume its existence, and enter upon its enjoyment subject to such regulations and limitations as the neutral state may please to prescribe for its own security. The United States have not, by treaty with any of the present belligerents, bound themselves to accord asylum to either, but neither have the United States given notice that they will not do it, and, of course, our ports are open for lawful purposes, to the ships of war of either Great Britain, France, Russia, Turkey or Sardinia. The courts of the United States have adopted unequivocally the doctrine that a ship of war, or any prize of hers in command of a public officer of a foreign sovereign, at peace with the United States, coming into our ports and demeaning herself in a friendly manner, possesses, in the ports of the United States, the right of exterritoriality and is exempt from the jurisdiction of the country. She remains a part of the territory of her sovereign. . . . The ship which the captain of the *Sitka* commanded was a part of the territory of his country; it was threatened with invasion from the local courts; and perhaps it was not only lawful, but highly discreet to depart and avoid unprofitable controversy. A prisoner of war on board a foreign man-of-war, or her prize, cannot be released by *habeas corpus* issuing from courts either of the United States or of a particular State. But if such prisoner of war be taken on shore, he becomes subject to the local jurisdiction or not, according as it may be agreed between the political authorities of the belligerent and the neutral Power.[55]

This case speaks for itself, and no further exposition is needed to show that, at the very least, it was impossible, according to prevailing principle in the United States for the Government at Washington, by any action whatsoever to affect the status of the *Appam* as a legal prize of the German Empire, especially by a request for the release of the prisoners held on board. Similarly, the British Government was not entitled to ask the United States to take action where neither of the two before-mentioned cases of breach of neutrality had taken

[55] Wheaton, pp. 726–727, note 218; Hall, p. 199; Opinions of Attorney Gen., Vol. 7, p. 123, Mr. Cushing, Apr. 28, 1855.

place. The only course open to the United States under international law [56] was to order the *Appam* to depart,[57] but under the treaty existing between the United States and Germany, even this last manner of procedure was closed to the American Government.

II

As previously said, upon the complaint of the former owner of the *Appam*, the District Court at Norfolk, Virginia, assumed jurisdiction of the case. Legal proceedings were instituted, the vessel was libelled, Lieutenant Berg was served with a summons on board the *Appam*, and the notices of judicial seizure were affixed on the masts of the prize in spite of the protests of the commander. It is easily perceived by what has been said that this proceeding of the American court, which was later extended so as to include the sale of the goods on board the prize, was contrary to both international and American law. According to American opinion, and the decisions of the Supreme Court at Washington the law of nations has always been a part of the law of the land and its principles are law in the United States the same as the private law developed within the States themselves. This view is contrary to German public law and that of most other states, for according to these nations, the tenets of the law of nations are applicable within a state only in so far as they are expressly recognized by some legal source as part of the law of the individual state. But as the law of nations is, according to American opinion, of binding force in the United States, an exposition of the principles of international law is sufficient to ascertain the law of the American Republic. According to this, the international and national principle of exterritoriality which was expressly stated to be applicable to prizes of war vessels in the case of the *Sitka*, should have restrained the United States court from executing any legal process on board the *Appam*.

According to fundamental principles, the following is apparent:

The *Appam* was under control of a crew composed of men and officers of the German navy; she had been taken into an American port as a prize of war, and was, therefore, to be looked upon by the

[56] Lee, Atty. Gen., 1797, 1 Op. 78; 8 Hamilton's Works, by Lodge, p. 304; Moore, Vol. 7, sec. 1223, p. 589.

[57] Moore, *op. cit.*

neutral state as a German prize, and the German Emperor, as the international representative of the Empire, should have been considered the person in possession and the presumptive owner of the prize. Consequently, the proper party against whom to bring an action was the German Empire, not Lieutenant Berg, for the fact that he held a commission and was in possession of the ship did not of itself authorize any legal proceedings against him.

In order to bring legal proceedings against a sovereign state, which Germany undeniably is, in the courts of a foreign nation, certain prescribed rules are fixed by international law which are universally recognized. The principle of the sovereignty of each member of the family of nations makes each one independent of the jurisdiction of each of the other states. It is apparent that the international principle of sovereignty is inconsistent with the idea that another state or the courts of such state can use any form of compulsion against another sovereign nation. Therefore, it may be stated as a fundamental principle that no state can be compelled against its will to appear before the tribunals of another state, and that without regard as to whether the claims against such state arise out of the law of nations, or even national or international civil law. There are two exceptions, however, recognized by international law, namely, that of the *forum rei sitae*, or the jurisdiction over the location of the *res* or thing in question, when the place of the controversy concerns an immovable thing located in a foreign state; and also the less generally recognized *forum hereditatis*, or the jurisdiction of the inheritance, when the subject in controversy is an inheritance in regard to which jurisdiction is given to the foreign state. This latter right is also well-founded in international private law. The principle of *forum prorogatum*, or jurisdiction on the basis of an agreement, occasionally referred to, is simply figurative in the sense now referred to, because in such a case the legal proceedings take place before the foreign court with the express consent of the state, and the idea of force and compulsion is not present. The same is true where a state itself brings an action in the courts of another state.

These principles are recognized everywhere.

The theory of the German law is recapitulated by Michelsen in the following words:

It is inconsistent with the equality of nations that a state must appear before the tribunal of another state. An exception is made in the two following cases:

(a) In all legal controversies which involve questions of real property, the courts of the country in which the property is located may assume jurisdiction.

(b) A state submits willingly to the tribunal of another state when the action itself is begun by such state. This does not give the right to set up a counterclaim against the plaintiff state (Prozess, "Anhalt"). Public property in the interior of a country is not thereby subject to execution.[58]

These same principles, including the *forum hereditatis*, before mentioned are further developed in the arbitration by the law faculty of the University of Berlin of the controversy between Roumania and Greece, involving the so-called Zapp'sche Inheritance.[59] They also came before the Berlin courts not so long ago for application to the sequestration of money which the Russian Government had placed with a Berlin bank in favor of a German creditor of that government.

The English views on the question are set forth by Westlake as follows:

In England the king may sue but cannot be sued in the ordinary course of justice; a claim against the crown is made by the extraordinary method of a petition of right. And a foreign state or sovereign cannot be made a defendant in an original suit on a personal claim, though it or he may sue, and will then be subject to all the proceedings in defence which could be taken against a private plaintiff. On the continent the opinions of jurists and the practice of the courts vary.[60]

The English Court of Appeals has, accordingly, in a case involving the admissibility of a legal civil proceeding against a Belgian mail ship which, according to agreement, was placed on a par with a battleship, declared that:

As a consequence of the absolute independence of every sovereign authority and of the international comity which induces every sovereign state to respect the independence of every other sovereign state, each and every one declines to exercise by means of any of its courts, any of its territorial jurisdiction over the person of any sovereign . . . or

[58] Michelsen, *Völkerrecht*, in the collection *Encyclopaedischer Grundriss der Rechtswissen schaften fuer Chinesen*, pp. 16–17.

[59] Westlake, Part 1, p. 241.

[60] *Ibid.*, p. 240.

over the public property of any state which is destined to its public use, . . . though such sovereign . . . or property be within its territory, and therefore, but for the common agreement, subject to its jurisdiction.[61]

The same principle was upheld by the English courts in the decision rendered in the case of Vavasseur *v.* Krupp involving the seizure of shells which the Japanese Government had bought in Germany and which were brought to England for the use of a battleship being built in that country. This "public property of the Mikado" was withdrawn from every legal process by order of the court.[62]

The same principles prevail in France as in Germany.[63]

The American position corresponds nearly to the German, even to the denial of the admissibility of a counterclaim without the consent of the foreign state where the latter brings the suit. Moore says in this regard:

An attachment was obtained against the United States of Mexico, in the courts of the State of New York, in respect of certain movable property of the Mexican Government, with a view to secure by that means satisfaction for certain claims. Under instructions of the Attorney General of the United States, the United States District Attorney at New York appeared, and, calling attention as *amicus curiae* to the court's want of jurisdiction, moved that the attachment be vacated. The motion was granted, the court saying that a foreign state could not be sued without its consent and that, so far as jurisdiction was concerned, there was no difference between the sovereign and his property.[64]

The rule "So far as jurisdiction is concerned, there is no difference between suits against a sovereign directly and suits against his property" was declared to be the rule in many other cases cited by Moore.[65]

This exemption of a foreign state from the jurisdiction of a court in another state can only be removed by the express consent of the foreign state, and the consent of a representative is not sufficient for this purpose.[66] The Supreme Court of the United States laid down

[61] Moore, Vol. 2, sec. 257, p. 591; The *Parlement Belge* (Feb. 27, 1880), L. R. 5, P. D., 197, 217.

[62] Vavasseur *v.* Krupp, L. R. 9, Ch. Div., 351, 354, 359, 360, July 3, 1878; Moore, Vol. 2, sec. 258, pp. 591–592.

[63] Wheaton, pp. 199–200, note 69.

[64] Moore, Vol. 2, sec. 258, p. 592.

[65] Moore, *op. cit.*

[66] *Ibid.*, p. 593.

this principle in the case of Chisholm *v.* Georgia, which involved the question whether the State of Georgia possessed a sovereignty distinct from that of the Federal Union, and whether the courts had jurisdiction over the State.[67] It was, in consequence, necessary to add the Eleventh Amendment to the United States Constitution, taking from the Federal court jurisdiction of suits against one of the United States brought by citizens of another state or by citizens or subjects of any foreign state.[68]

According to American law, there is a still further exception to this immunity of sovereign states. Foreign prizes taken in violation of the neutrality of the United States are subject to the jurisdiction of its courts. Section 7 of the Neutrality Act of 1818 declares that "the District Courts shall take cognizance of complaints by whomsoever instituted, in cases of captures made within the waters of the United States, or within a marine league of the coasts or the shores thereof." [69] Moreover, the ordinary Federal courts are the regular prize courts in the United States, in contrast to European regulations which intrust this duty to extraordinary boards appointed by the governments.[70] In the first instance, the District Court has jurisdiction from which appeals run to the Circuit Court in cases involving more than $300, and to the Supreme Court if the case involves in excess of $2000. The limitations on the subject matter have now been increased.

The jurisdiction conferred by Section 7 of the Act of 1818 has been stretched, according to the prevailing American view, to prizes made in violation of American neutrality. Moore says in this connection:

> The cases of the *Cassius*, 3 Dallas, 121, and the *Invincible*, 1 Wheaton, 238, decide that neither a public vessel of another nation, nor its officers, *are liable to answer* in our courts for a capture on the high seas, but do not touch the question of jurisdiction over her prizes lying in our ports, which extends to libels *in rem* for restitution of such prizes made in violation of our neutrality.[71]

[67] Willoughby, The American Constitutional System, New York, 1904 (Amer. State Series), p. 37; Chisholm *v.* Georgia, 2 Dallas 419.

[68] Willoughby, pp. 172, 288.

[69] Westlake, Part 2, p. 201.

[70] Wheaton, Elements, Appendix 4, p. 960, *et seq.* especially pp. 968, 969.

[71] Vol. 2, sec. 254, p. 581, also Vol. 2, sec. 258, p. 593; The *Santissima Trinidad*, 7 Wheaton, 283; The *Gran Para*, 7 Wheaton, 471; also Moore, Int. Arbit., Vol. 1, pp. 576–578.

It was not the intention of the statute to deprive the foreign state of jurisdiction, even if it was concerned only in looking into the legality of the capture. The object was simply to obviate the results of a violation of sovereignty by an illegal act, and to return the prize, under such circumstances, to the former owner. For this purpose the courts as the duly constituted authority for the maintenance of the rights of sovereignty of the neutral nation need only to decide the question of the violation of sovereignty. They are confined solely to this question and are excluded from any further adjudication of the subject at hand, such as the assessment of damages, or the like.[72]

What is a violation of neutrality must be determined from the neutrality proclamations of the Presidents promulgated at the outbreak of wars between foreign states. The neutrality proclamations of Presidents Grant, Roosevelt, and Wilson, the last issued for the present war, are of similar import. There is nothing in any of the proclamations of the present Executive which might be of application to the case of the *Appam*. It is a settled rule, however, that claims arising out of the violation of the principle of neutrality can only be prosecuted by the government of the country of the former owner, and not by the owner himself,[73] as is also the corresponding principle that the government of the country whose neutrality has been violated, and not the injured private person, must appear in the prize courts of the belligerent state and ask for the release of the prize.[74]

Judge Story says in this connection (1882):

> If the case were entirely new, it would deserve very great consideration whether a claim founded on a violation of our neutral jurisdiction could be asserted by private persons, or in any other manner than by a direct interposition of the government itself. But the practice from the beginning of this class of cases, a period of nearly thirty years, has been uniformly the other way and it is now too late to disturb it.[75]

However, in cases involving the more remote breach of neutrality, namely, when the prize is not made within the territorial waters of the neutral state or by a warship making the United States a basis for its operations, but is captured by a ship fitted out within the ports of

[72] Perels, *Int. Oeffentl. Seerecht*, pp. 302, 304.
[73] Hall, p. 645, note 2.
[74] Wheaton, p. 722; Westlake, Part 2, p. 199.
[75] Hall, page 645, note 2.

this country in violation of neutrality, a suit by the private owner is permissible in the United States courts.[76]

Therefore, the suit in the District Court at Norfolk could be brought only by the British Government. The private party could appear as party plaintiff only in case of the before-mentioned remote breach of neutrality. Even the British Government could bring suit only when the plea was based on a breach of neutrality inherent in the capture. This procedure was not followed in the case of the *Appam*.

Finally, it is apparent that the suit was not admissible because of its object, which was, as cannot be denied, the return to the former English owners of a prize of the German Empire; in passing upon the English demands the American courts would have to pass upon the legality of the capture and that simply because the ship was lying in an American harbor.

Such a claim, according to general, and particularly according to English and American legal rulings, is not one which can be passed upon by an American or other neutral court. The courts of the state of the captor alone have exclusive jurisdiction in regard to the legality of the prize.[77] The only exceptions to this rule have been discussed. England herself has maintained these principles with the greatest determination. It will suffice, at this point, to mention the familiar controversy with Frederick the Great, who, in order to do justice to his subjects and to remedy what he thought was a wrong done them by English prize courts, levied upon money which was to be sent to England and at the same time instituted a court in Prussia to review the English prize court proceedings. In one of the writings which this celebrated controversy brought forth in behalf of the English, it was said:

> The procedure of the King of Prussia was an innovation, which was never attempted in any country of the world before. Prize or no prize must be determined by courts of admiralty belonging to the Power whose subjects made the capture. . . . No crown had the right to pass

[76] Hall, *op. cit.*

[77] Perels, *Seerecht*, p. 304; Calvo, *Le Droit International Theoretique et Pratique*, secs. 3041, 3042; Bluntschli, *Das Moderne Völkerrecht der Civilisirten Staaten*, secs. 842, 845; Wehberg, p. 319; Wheaton, p. 669, note 200; pp. 678, 975; Moore, Vol. 2, sec. 254, p. 580; Vol. 7, sec. 1223, p. 588.

upon the legality of a prize made by the subjects of another crown or to attempt to override the judgments of a court of another country. That was uncontroverted international law.[78]

The Supreme Court of the United States, with equal firmness, declared itself in favor of this principle in the case of The Alerta *v.* Moran, in which it was said:

> The general rule is undeniable that the trial of captures made on the high seas *jure belli* by a duly commissioned vessel of war whether from an enemy or a neutral, belongs exclusively to the courts of that nation to whom the captor belongs.[79]

Likewise,

> The exclusive cognizance of prize questions belongs in general to the capturing Power, and the courts of other countries will not undertake to redress alleged marine torts committed by public armed vessels in assertion of belligerent rights.[80]

This exclusive right is derived from the military right of possession which the captor Power has over the prize.[81] It extends also, and according to Anglo-American jurisprudence, to the prizes in the ports of a neutral Power. This is clearly shown in the following quotation from Halleck:

> The Supreme Court of the United States has followed the English rule, and has held valid the condemnation, by a belligerent court, of prizes carried into a neutral port and remaining there, the practice being justifiable on the ground of convenience to belligerents, as well as neutrals; and though the prize was, in fact, within neutral territory, it was still to be deemed under the control or *sub potestate* of the captor, whose possession is considered as that of his sovereign. It may also be remarked, that the rule thus established by the highest courts of England and the United States, is sanctioned by the practice of France, Spain and Holland.[82]

[78] Wheaton, pp. 678–679; Trendelenburg, *Friedrichs des Grossen Verdienst um das Völkerrecht im Seekrieg*, Berlin, 1866, p. 12.

[79] Moore, Vol. 2, sec. 254, p. 580; The Alerta *v.* Moran (Mar. 10, 1815), 9 Cranch, 359, 364.

[80] Moore, Vol. 7, sec. 1223, p. 588; *The Invincible*, 1 Wheat. 238.

[81] Wheaton, p. 669, note 201, p. 962.

[82] Halleck, Int. Law, Vol. 2, 3d ed. by Baker, p. 405, cited in Moore, Vol. 7, sec. 1224, p. 591.

Phillimore remarks to like effect:

> An attentive review of all the cases decided in the courts of England and the North American United States during the last war, 1793–1815, leads to the conclusion that the condemnation of a capture by a regular prize court, sitting in the country of a belligerent, of a prize lying at the time of the sentence in a neutral port, is irregular, but clearly valid.[83]

The valid judgment of a competent national prize court is final as to the question of ownership, and no revision by another court or any other authority is permissible. The case is closed for all time.[84] It is the English and American practice to designate such a proceeding as conclusive.[85]

However, after such a decision, a settlement through diplomatic channels still remains open, so that if the third state is not satisfied with the judgment rendered, it may resort to diplomacy to solve the difficulty. This is the case, however, only in time of peace, because according to the law of nations, in time of war every duty of granting indemnity between belligerents is suspended. These principles of international law are undisputed, and every government is permitted, when peace is concluded between the parties, to press claims of indemnity against a former opponent.

To return to the question at hand. If the decision of the courts and authorities of a state are regarded as binding outside its territorial jurisdiction, the state rendering such a decision is still answerable for it to other sovereign states in so far as the foreign state considers the decision unfair and seeks redress by methods known to international law, such as payment of an indemnity or some other means of reimbursement. The decision of the court is never disturbed, but the state is answerable for all results which follow from such a decision if it is inconsistent with international law.[86]

Therefore, to return to the controversy of Frederick the Great with England, it may be said that the King persuaded the English

[83] Westlake, Part 2, p. 215, who is opposed to this.

[84] Wheaton, pp. 673, 972.

[85] Wheaton, p. 972 (the conclusiveness of sentences of condemnation upon the property is cited from the decisions of Judge Story).

[86] *Ibid.*, pp. 673–675, 681–682.

Government, by means of diplomatic measures, to pay an indemnity to the Prussian Government, and on obtaining the same, Frederick removed the attachment which had been placed on money owing to English creditors, and awarded the indemnity to those Prussian subjects who had been injured by the findings of the English prize court. The efficacy of the judgment in prize, however, was not affected by the negotiations between the two governments.[87]

In conclusion, it may be said as to America that Wheaton, who was the official American negotiator for the adjustment of the difficulty arising out of the capture of American ships and cargoes by Denmark during the Danish-English War at the beginning of the nineteenth century, made these principles the foundation for the American claims and for the subsequent negotiations. He relied upon them, although he recognized the continuing force of the decrees of the Danish prize courts in the several instances as settling the question of the loss and transfer of property in the prize. This did not deter him, however, from insisting that the Danish Government should indemnify the United States as the representative of its injured citizens, because, according to the American point of view, justice had not been done its citizens, and the Danish Government was responsible, according to international law, for the damage occasioned.[88] This case is not to be confused with the controversy over the Bergen Prizes, mentioned in another connection.

Accordingly, nothing remains for the former English owners of the *Appam* but to await the decision of the German Prize Court, and to leave it to the British Government whether any claims may be brought through diplomatic channels against the Imperial German Government which is responsible for the judgment rendered by its court.

DR. ARTHUR BURCHARD.

[87] Wheaton, p. 679; Tredelenburg, pp. 8, 16.

[88] *Ibid.*, pp. 681–682.

THE APPAM CASE

THE arrival of the fine British passenger vessel *Appam* at Newport News on January 31, 1916, in charge of a German prize crew and with about four hundred and fifty British subjects, passengers and sailors, including the Governor of Sierra Leone and some other prominent officials, not only created a picturesque situation, but raised some very important problems of international law.

The activities of the British Navy had practically cleared the seas of German raiders and it was not until the arival of the *Appam* that the exploits of the German cruiser *Moewe* were revealed. This active and intrepid belligerent, escaping the blockade in the North Sea, had captured and destroyed some fifteen merchant vessels during a cruise lasting several months and finally returned unscathed to her home port in March, 1916. The *Appam* was, when captured off the West Coast of Africa, 1590 miles from Emden, the nearest German port, 130 miles from Punchello in the Madeiras, the nearest available port, 1450 miles from Liverpool, and 3051 miles from Hampton Roads. The *Appam* carried a gun, but she made no resistance to capture. The commander of the *Moewe* placed Lieutenant Berg, an officer of the German Naval Reserve, on board as commander, together with a crew of twenty-two men. Lieutenant Berg placed bombs in various portions of the vessel and informed the officers and crew that in case of any trouble the vessel would immediately be blown up. The German crew did not operate the vessel, but merely navigated her and acted as an armed guard under whose vigilant firearms the British crew and especially the engine room force were kept at work until the vessel came into the harbor of Hampton Roads, where she arrived on January 31, in first-class order, seaworthy and supplied with provisions. The prisoners brought in by the *Appam* were released by the United States Government. Berg reported to the Collector and filed with him a copy of his instructions from the commander of the *Moewe*. These brief instructions were a most

important factor in the case. They directed Berg "*to bring this ship into the nearest American harbor, and there to lay up.*"

Subsequent to the arrival of the *Appam* the German Ambassador informed the State Department that the *Appam* was not an auxiliary cruiser, or a tender, but a prize, and claimed that she should be allowed to remain in an American port in accordance with Article XIX of the treaty with Prussia of 1799. The American Secretary of State in a careful and lucid opinion held that article of the treaty inapplicable and found no warrant in international law for the *Appam's* entrance into an American port.

On February 16th, sixteen days after the arrival of the *Appam* in Hampton Roads, the owner filed a libel to recover the vessel on the ground that she was in American waters in violation of the law of nations and the neutrality of the United States. The Prize Master and German Vice-Consul, appearing as claimants and respondents, claimed on behalf of the German Government that the *Appam* was brought there in reliance upon the treaty with Prussia and, moreover, that under general principles of international law she was entitled to stay an indefinite time in an American port. The institution of prize proceedings in the competent German court was also pleaded, and it was claimed that the American courts were without jurisdiction.

The case was fully tried and argued before the United States District Court, which held that the court had jurisdiction and that the *Appam*, having come into an American port in violation of American neutrality, should be released to her former owners. The case was appealed by the respondents to the Supreme Court of the United States. The holding of that court was that the decisive questions in this case resolved themselves into three:

1. Was the use of an American port, under the circumstances shown, a breach of this nation's neutrality under the principles of international law?
2. Was such use justified by existing treaties?
3. Was there jurisdiction over the *Appam* and her cargo in a Court of Admiralty of the United States?

All of these questions were answered in favor of the owners of the vessel and cargo; the judgment of the District Court was affirmed,

and the interesting and important questions involved set at rest so far as the United States was concerned. The opinion of the court is unanimous and the reasons for its decision are precisely and pithily set forth by Mr. Justice Day. I can here do little more than amplify some of the reasoning of the decision.

A very elaborate argument in both courts turned upon three questions:

(*a*) The rule of international law as to the treatment to be accorded to prizes in neutral ports prior to condemnation.

(*b*) The effects of the Prussian treaty upon the status of such ships in American ports, and

(*c*) The jurisdiction of the courts of the United States to pass upon the question and their power to release the vessel to the former owners.

It was contended by the German Government that under the general rules of international law any nation might permit a belligerent to send prizes into its ports for sequestration and that such prizes might remain indefinitely in such ports without interference from the local jurisdiction. It was admitted that a nation might by proclamation prior to the outbreak of hostilities announce that its ports would not be open to receive prizes, but it was claimed that in any other event prizes should be accorded asylum.

It appears to me that the German contentions ignored the development of international law in this respect, and especially the position assumed by the United States in developing the rights and duties of a neutral. The whole question was fully discussed at the Hague Conference of 1907 and the result was the provisions of Articles 21, 22 and 23 of Convention XIII. These articles read as follows:

ARTICLE 21. A prize may only be brought into a neutral port on account of unseaworthiness, stress of weather, or want of fuel or provisions. It must leave as soon as the circumstances which justified its entry are at an end. If it does not, the neutral Power must order it to leave at once; should it fail to obey, the neutral Power must employ the means at its disposal to release it with its officers and crew and to intern the prize crew.

ARTICLE 22. A neutral Power must, similarly, release a prize brought into one of its ports under circumstances other than those referred to in Article 21.

ARTICLE 23. A neutral Power may allow prizes to enter its ports and roadsteads, whether under convoy or not, when they are brought

there to be sequestrated pending the decision of a prize court. It may have the prize taken to another of its ports. If the prize is convoyed by a warship, the prize crew may go on board the convoying ship. If the prize is not under convoy, the prize crew are left at liberty.

It is clear that had all the Powers ratified these three articles, the United States would have had it in its power to allow vessels to be sequestrated in its ports, but this, it would seem, on the face of Article 23, would have required positive action preliminary to the outbreak of hostilities. The action of the United States, however, in regard to this convention was highly significant and emphatically indicates the policy of this nation on the question. The American delegates in their report to the Government stated as to Article 23:

> This is objectionable for the reason that it involves a neutral in participation in the war to the extent of giving asylum to a prize which the belligerent may not be able to conduct to a home port. This article represents the revival of an ancient abuse and should not be approved.

The delegates, therefore, refused to approve Article 23, but approved Articles 21 and 22. These articles were ratified by the Senate of the United States and the act of ratification states: "That the United States adheres to the said Convention, subject to the reservation and exclusion of its Article 23."

This demonstrates the view of the Executive and of the Senate, that is, of the treaty-making power, as to the rule approved by the Government of the United States. This action of the treaty-making power is in accordance with the precedents of the United States and with the spirit shown by our government since its foundation in protecting its neutral rights. The rule, however, preventing a belligerent from using a neutral port as a place of deposit for its spoils is an ancient one. It may be found in old French ordinances of the sixteenth and seventeenth centuries. In 1658 the States General of Holland declared in favor of the rule, and "That if any one should act to the contrary, the prize should be restored to the former owner as though it had never been taken."

The distinction found in Article 21 of the Hague Convention is nevertheless always made that a vessel taking refuge from the weather, or when short of provisions, may seek temporary shelter in a neutral port. This is based upon grounds of humanity.

Early rulings of Lord Stowell are to the same effect and the practice of sequestration was condemned by him on the ground that "It gives one belligerent the unfair advantage of a new station of war which does not properly belong to him, and it gives to the other the unfair disadvantage of an active enemy in a quarter where no enemy would naturally be found."

It is interesting to observe that the German Prize Code itself expressly adopts the rules of Articles 21 and 22, for it declares:

> A prize may be brought into a neutral port *only if the neutral Power permits the bringing in of prizes. A prize may be taken into a neutral port on account of unseaworthiness, stress of weather, or lack of fuel and supplies. In the latter case she must leave as soon as the cause justifying her entrance ceases to exist.*

As long ago as 1866 the rule was admirably stated in Dana's note to Wheaton: "The modern practice of neutrals prohibits the use of their ports by the prize of a belligerent, except in case of necessity, and they may remain in the ports only for a meeting of the exigency."[1]

It is true that, as the delegates to The Hague say, certain abuses did arise and that in the eighteenth century may be found bases in which prizes were allowed to be sent into neutral ports for sequestration. This, however, could not be done without the consent, express or implied, of the neutrals, and aside from the treaties shortly to be mentioned, the United States never consented to such a practice.

In principle such asylum is evidently a violation of the fundamental obligations of neutrality. If applied to the present war, it would mean that German submarines operating on our coast might have brought into our ports several hundred belligerent vessels, and thus made our territory the basis from which to carry on their raiding expeditions. This is the view adopted by the great German commentator Bluntschli himself, for he says:

> If, on the contrary, the victor brings his prize into a neutral port in order to make her more safe and so that he may fly the more quickly to new conquests, he would be using the neutral territory as a base of operations, which could not be tolerated. The neutral state should then, in order clearly to indicate its intention to remain neutral, refuse the

[1] Wheaton's Int. Law, 8th Am. ed. sec. 391.

entry of its ports to all prizes taken by belligerents unless there is a question of ships in distress.[2]

Such was the attitude adopted by foreign nations toward the United States during the Civil War. As early as June, 1861, the British Foreign Office instructed the Admiralty that, pursuant to the desire of Her Majesty's Government to observe the strictest neutrality between the United States and the Confederate States, the armed ships and privateers of both parties are interdicted "from carrying prizes made by them into the ports, harbors, roadsteads or waters of the United Kingdom, or of any of Her Majesty's Colonies or possessions abroad." These instructions were rigidly carried out, and similar rules announced by France, Belgium, The Netherlands, Spain, Portugal, and Hamburg and Bremen, then free states. That this was the law and the usual and proper practice of nations appears clearly from Mr. Seward's communication to the Peruvian Legation as to the course the United States would pursue during the war between Spain and Peru: "This government will observe the neutrality which is enjoined by its own municipal law and by the law of nations. No armed vessels of either party will be allowed to bring their prizes into the ports of the United States."

It is difficult to see how, at this late date, this practice, so consonant with common sense, supported by authority, consecrated by long practice and approved by the United States officials and its treaty-making power, should now be put in question.

The German Government during the course of the litigation laid much stress upon the incident of the Bergen Prizes. These were British vessels taken as prizes by Paul Jones and sent into Bergen, which Denmark seized and restored to their former owners on the ground that it had not acknowledged the independence of the United States and the prizes could not be considered as lawful. The prizes were sent into Bergen under stress of weather and for necessary repairs, which might have justified the claim of the United States, but in any event that claim was not acceded to, no arbitration was had, and so far as any precedent at all was created, it was against the right of sequestration.

We must remember that international law is continually in process of growth. Originally the concept of neutrality was of a very vague

[2] International Law Codified, sec. 778 notes.

character and belligerents refused to recognize neutral rights. During our Revolutionary War these rights were still unsettled. It was the course of the United States subsequent to the Revolution and during the long wars ensuing from the French Revolution which did so much to place on a definite basis the rights and duties of neutrals. This was very clearly indicated throughout the painful controversy with France engendered by the acts of M. Genet in fitting out ships and establishing prize courts in American ports. The treaties with France of 1778 and 1800 contained a provision substantially similar to that contained in the Prussian treaty of 1799 and relied upon by the German Government as justifying the sending of the *Appam* into an American port. Article XXIV of the treaty with France of 1800 and Article XIX of the treaty with Prussia of 1799 are juxtaposed in parallel columns, where their similarity may easily be seen.

Treaty With Prussia, 1799
Article XIX

The vessels of war, public and private, of both parties, shall carry freely, wheresoever they please, the vessels and effects taken from their enemies, without being obliged to pay any duties, charges or fees to officers of admiralty or of the customs, or any others; nor shall such prizes be arrested, searched, or put under legal process, when they come to and enter the ports of the other party, but may freely be carried out again at any time by their captors to the places expressed in their commissions, which the commanding officer of such vessel shall be obliged to show. But conformably to the treaties existing between the United States and Great Britain no vessel, that shall have made a prize upon British subjects, shall have a right to shelter in the ports of the United States, but if forced therein by tempests or any other danger, or accident of the sea, they shall be obliged to depart as soon as possible.

Treaty With France, 1800
Article XXIV

When the ships of war of the two contracting parties, or those belonging to their citizens which are armed in war, shall be admitted to enter with their prizes the ports of either of the two parties, the said public or private ships, as well as their prizes, shall not be obliged to pay any duty either to the officers of the place, the judges or any others; nor shall such prizes when they come to and enter the ports of either party, be arrested or seized, nor shall the officers of the place make examination concerning the lawfulness of such prizes; but they may hoist sail at any time and depart and carry their prizes to the places expressed in their commissions, which the commanders of such ships of war shall be obliged to show. It is always understood that the stipulations of this article shall not extend beyond the privileges of the most favored nation.

Relying upon this treaty, Genet undertook to have French consuls establish prize courts in American harbors and to use such harbors for fitting out privateers to prey upon British commerce. Great Britain naturally protested and much diplomatic controversy ensued. Finally, Mr. Jefferson stated the views of this government, as follows:

> The doctrine as to the admission of prizes maintained by the government from the commencement of the war between England, France, etc., to this day has been this: The treaties give a right to armed vessels with their prizes to go where they please (consequently into our ports) and that these prizes shall not be detained, seized or adjudicated, but that the armed vessel may depart as speedily as may be with her prize to the place of her commission; and we are not to suffer their enemies to sell in our ports the prizes taken by their privateers. Before the British treaty, no stipulation stood in the way of permitting France to sell her prizes here; and we did permit it, but expressly as a favor not as a right. . . . These stipulations admit the prizes to put into our ports in cases of necessity, or perhaps of convenience, but no right to remain if disagreeable to us; and absolutely not to be sold.

And Mr. Pickering, Secretary of State in 1796, held that the sale of prizes brought by armed ships of the French Republic into our ports was not a right to which the captors were entitled either by the law of nations or our Treaty of Amity and Commerce with France.

Thus, even at a time when the general rule was much less firmly established than at present and when every consideration dictated the most sympathetic treatment of France, prizes even when arriving with their captors were only allowed temporary stay in our ports. The possibilities which might have arisen from giving to the treaty a wider interpretation were vividly impressed upon the officials of Washington's administrations, and had it not been for the firm attitude adopted by them in preventing our ports from being used as a deposit for the spoils of war, we should have been dragged into war long before 1812.

The German Government claimed from the beginning of this litigation that the *Appam* had been sent into Newport News in reliance upon Article XIX of the Prussian treaty. It was quite evident that they intended to make of this a test case. Had they prevailed in their

contentions the United States ports, if the government remained neutral, would have been of the utmost convenience to them in the not improbable event of submarine operations along our coast. Such operations could have been much more effectively carried on here than in the waters surrounding the British Channel and would, in fact, not only have stopped shipping so effectively as to create a blockade here, but would have created for the German Government a fine fleet of merchant vessels for use after the war. It is, therefore, not to be wondered at that the German Foreign Office felt that it had discovered in Article XIX a war instrument of superlative value.

The question was raised *in foro* before the State Department by Count Bernstorff, late German Ambassador. He insisted that the *Appam* was under the treaty immune from the jurisdiction of our courts, and that she might remain sheltered in our ports indefinitely. The State Department gave very careful consideration to the question and held the treaty inapplicable. As it would be impossible to condense the very succinct reply of the Secretary of State, whose statement of the law was approved by the Supreme Court of the United States, I cite it as follows:

> At the outset it may be pointed out that as the object of this provision was to mollify the existing practice of nations as to asylum of prizes brought into neutral ports by men-of-war it is subject to a strict interpretation when its privileges are invoked in a given case in modification of the established rule. By a reasonable interpretation of Article XIX, however, it seems clear that it is applicable only to prizes which are brought into American ports by vessels of war. The *Appam*, however, as your Excellency is aware, was not accompanied by a ship of war, but came into the port of Norfolk, alone in charge of a prize master and crew. Moreover, the treaty article allows to capturing vessels the privileges of carrying out their prizes again "to the places expressed in their commissions." The commissions referred to are manifestly those of the captor vessels which accompany prizes into port and not those of the officers of the prizes arriving in port without convoy, and it is clear that the port of refuge was not to be made a port of ultimate destination or indefinite asylum. In the case of the *Appam*, the commission of Lieutenant Berg, a copy of which was given to the collector of customs at Norfolk, not only is a commission of a prize master, but directs him to bring the *Appam* to the nearest American port and "there to lay her up." In the opinion of the Government of the United States, therefore, the case of the *Appam* does not fall within the evident

meaning of the treaty provision which contemplates temporary asylum for vessels of war accompanying prizes while en route to the places named in the commander's commission, but not the deposit of spoils of war in an American port. . . . Under this construction of the treaty the *Appam* can enjoy only those privileges usually granted by maritime nations, including Germany, to prizes of war, namely, to enter neutral ports only in case of stress of weather, want of fuel and provisions or necessity of repairs, but to leave as soon as the cause of their entry has been removed.

This ruling of the Department of State thus accords with American precedent as established in the case of the treaty with France, and further emphatically states the general international rule. As the Supreme Court puts it:

Certainly such use of a neutral port is very far from that contemplated, which made provision only for temporary asylum for certain purposes, and cannot be held to imply an intention to make of an American port a harbor of refuge for captured prizes of a belligerent government.

On the broad questions of international law, in addition to those heretofore considered, counsel for the German Government, especially in their argument before the Supreme Court, based their claims largely, if not mainly, upon lack of jurisdiction in the court to entertain such a suit. The rights of the British owners, so the argument ran, had been extinguished upon the capture of the vessel, which in itself transferred title to Germany, and, even admitting that the United States might have excluded such vessels as a matter of law or policy from their ports, no court was empowered to restore such a vessel to the original owners, who had lost every scintilla of right and title therein. This argument pressed with vigor, might seem upon superficial examination to present considerable plausibility. It was, however, of a highly technical character and is scarce alluded to in the opinion of the court.

It was admitted that from the beginning of the Republic our courts have taken jurisdiction: (1) In cases of capture in our territorial waters; and (2) In cases where the capturing vessel had fitted out or increased her crew or armament in an American port. The jurisdiction of our courts in this class of cases was directly derived from the Constitution, and not dependent upon statutory enactments. In the famous case of *The Betsey* (3 Dall. 6), decided prior to the enactment of the first

neutrality statute, the Supreme Court held that the Federal Courts had jurisdiction in all such cases, and the proposition has not since been questioned.

It was strenuously endeavored to differentiate these cases on the ground that, as there had been no illegality in the capture, complete title had passed and the original owners were thus deprived of all standing in court, and that the question of prize was one for the German Prize Court, over which it had exclusive jurisdiction. The vice of this argument, however, lay in the assumption that full title passed at the moment of capture. It ignored the fact that while the vessel remained in the condition of a mere prize, recapture might be effected and in the event of recapture the rights of the lawful owner would revest.

From early times it has been held that mere capture is not sufficient to divest the title of the owner. The requirements for such divestment have fluctuated somewhat. Early cases held the rule of pernoctation or twenty-four hours firm possession, but later cases held the rule of *infra praesidia*, and finally the rule now established is that the vessel must be brought within the jurisdiction of the proper prize court and that the rights of the owner are not completely divested until a decision is there had. When a vessel captured by an enemy warship is recaptured, we say that the title of the original owners reverts or is reestablished. It might be more exact to say that their right, menaced with extinction by the establishment and perfection of an adverse right, has been freed from this menace; and that the full exercise of their right has again become possible. This construction is more satisfactory; because it is clear that, if the enemy state had acquired full title by capture, recapture would logically vest title not in the original owners, but in their government.

The rule is as old as the *Consulatus Maris*. It could not be better stated than in the opinion of Justice Storey, in the case of *The Star*, 3 Wheaton, 78, 86:

> It is admitted, on all sides, by public jurists, that in cases of capture a firm possession changes the title of the property; and although there has been in former times much vexed discussion as to the time at which this change of property takes place, whether on the capture, or on the pernoctation, or on the carrying *infra praesidia* of the prize; *it is universally allowed that, at all events, a sentence of condemnation completely*

extinguishes the title of the original proprietor, and transfers a rightful title to the captors or their sovereign.

This rule is indeed in conformity with common sense. Had the *Appam* attempted to go to the nearest German port it would have risked almost certain capture by British cruisers; it followed the much safer course of traveling more than twice the distance and taking refuge in an American port. It was thus by the interposition of an American port between the *Appam* and the British fleet that the German Government hoped to save the vessel for their future benefit. Had not this illegal use of an American port been resorted to the vessel would in all human probability have been recaptured and restored to its former owners. The rule of law is thus in consonance with the dictates of common sense. Bluntschli himself says:

1. Up to the time when the tribunal has taken jurisdiction and condemned the prize the fate of the latter is uncertain; neither the captor nor his government have as yet rights over the vessel or its cargo, the prize resting up to the date of the judgment merely upon the right of the stronger; the seizure may be annulled by force. This is a special application of the rights of *post liminium* and in *integrum restitutio.*

2. The recapture has effects essentially negative; it annuls the capture (prise). It does not even constitute a new capture (prise). The recaptor must then respect the goods which he has saved from the hands of the enemy and for his service can only claim a recompense.[3]

And he again states the rule: "The recapture of captured vessels may take place so long as prize courts have not pronounced upon the validity of the capture."

We find upon this point French and German in agreement, for one of the leading modern commentators, Bonfils, formulates the proposition very happily thus:

No. 1416. *Recaptions.* A merchant ship is captured by a hostile war vessel, then recaptured by a war ship of its own nation. What are the effects of this rescue? Do the ship and its cargo revert to their owners, or do they become the property of the recapturing government? From the point of view of jurisprudence this question, it would seem, ought to raise no difficulty. Until the judgment passed upon the validity of the capture shall recognize its legitimacy and shall order the confiscation of the ship and of the cargo, the captor has acquired no right

[3] International Law Codified, paragraph 860, notes.

of ownership. The right of the owner who has been dispossessed has been paralyzed but not extinguished. The recaptor can have no more right than those from whom he has recaptured the prize. The owner ought then to re-enter into possession of the property taken from him by violence. Such a decision is logical and in accordance with the spirit of justice.

The solution of this question could be different only if it were assumed that the very fact of capture *per se* transferred to the captor the ownership of the captured ship and cargo. Under this assumption whatever right the original captor had acquired by the capture would pass to the recaptor.

This rule is embodied in the United States Prize Act, U. S. Revised Statutes, section 4652.

It is, therefore, not to be wondered at that the Supreme Court promptly but effectively disposes of the question as follows:

> The violation of American neutrality is the basis of jurisdiction, and the admiralty courts may order restitution for a violation of such neutrality. In each case the jurisdiction and order rests upon the authority of the courts of the United States to make restitution to private owners for violations of neutrality where offending vessels are within our jurisdiction, thus vindicating our rights and obligations as a neutral people.

It is fortunate that in a case of such far-reaching importance, involving fundamental propositions of international law, both our Executive and our courts have passed upon the question after most mature consideration and have reached similar conclusions embodied in definite, authoritative decisions.

FREDERIC R. COUDERT.

RIGHT OF THE MASTER AND CREW OF A CAPTURED SHIP TO EFFECT HER RESCUE

A MERCHANT ship captured in war by a cruiser is commonly put in the hands of a prize crew and, often with her own master and crew aboard, directed to proceed to the nearest port of the captor available for adjudication as to prize or no prize.

The cases in which the original master and crew have, during such transit, risen against the prize crew and, by force or fraud or both regained control of the ship are fairly numerous. It is proposed to examine the legality of such a course, and the rights derived therefrom; also the rights in the premises of the belligerent whose possession is displaced.

Bouvier lays down the rule that "Rescue differs from recapture. The rescuers do not by the rescue become owners of the property, as if it had been a new prize, but the property is restored to the original owners by the right of *post liminium*." [1]

In the first place, it must be observed, that on the capture of a neutral vessel no title whatever is divested and none passes to the captor, until adjudication. In the meantime possession got by force may be kept by force and likewise may be displaced by force. If it is so displaced by the original master and crew, it is not a recapture but a rescue, and the original title is merely freed from the forcible possession of the enemy and exists unencumbered as before capture. As soon as the ship reaches a port in her own sovereignty, liability to any penalty for such rescue ceases, and if captured on a subsequent voyage, she cannot be condemned for the former transaction. The lien of the captor, as it were, is destroyed when possession ceases. No adjudication is necessary to restore the title of the original owner, which has never ceased to exist. It was encumbered by the enemy's possession; that being ended, the title resumes its freedom and exists as before capture.

[1] *Bouvier's Law Dictionary*, title, "Rescue in Maritime Law."

The act of the master and crew in rescuing their ship is not one covered by their contract of service. It is beyond such agreed labors and responsibilities. A mariner is bound to aid in saving his ship from marine disaster and, therefore, he has no salvage for such service, which is fully rewarded by his wage. On the other hand, the rescue, being beyond his employment, is held good ground for salvage. Since neither salvage nor other reward is given by a court of justice for immoral or unlawful acts, such awards of salvage are the highest evidence that such rescues are, so far at least as the law of the court awarding the salvage is concerned, neither immoral nor unlawful acts. They have been frequently termed, in the opinion of eminent judges — "highly meritorious acts."

On a claim for salvage against an American ship taken by the French while bound from Philadelphia to London and rescued by her crew, the English court took jurisdiction because certain of the rescuing crew were British subjects and claimed salvage. Sir W. Scott (p. 277) says:

> For although it is meritorious to rescue by force of arms from an enemy, it is quite the reverse to rescue from a neutral, from whom the owner would have a right to claim costs and damages for an unjust seizure and detention. If instead of this a rescue by force is attempted, and the party takes the law into his own hands, it becomes a breach of the law of nations, which would endanger the ship and cargo if that attempt should be disappointed.

He holds the French enemies to America and then holds that every person assisting in rescue has a lien on the thing saved. He holds the acts of the master and crew as to the rescue were

> no part of their general duty as seamen; they were not bound by their general duty as mariners to attempt a rescue; nor would they have been guilty of a desertion of their duty, in that capacity, if they had declined it. It is a meritorious act to join in such attempts; and if there are persons who entertain any doubts whether it ought to be so regarded I desire not to be considered as one of the persons who entertain any such doubts. But it is an act perfectly voluntary, in which each individual is a volunteer, and is not acting as a part of the crew of the ship in discharge of any official duty, either ordinary or extraordinary.[2]

[2] The *Two Friends*, McDougal master, 1 C. Robinson, 271.

Two years later, in 1801, the same eminent judge decided the celebrated case of *The Beaver*, Conner master.[3] This was a case of a British merchant ship taken with a cargo of wine, in sight of the English coast, by a French privateer, when all the crew, except the master and one boy, had been taken out. The master, seeing an opportunity, rose upon five Frenchmen that had been put on board and by knocking down the prize master and possessing himself of his pistols, the only fire arms on board, succeeded in driving the rest of the crew down below, and gained possession of the vessel. After steering some time toward the English coast, the ship was nearly lost in a storm. The master got twelve men from a British frigate, which came in sight, and kept possession. Finally, thinking the ship must be lost, all returned to the frigate. Later, the storm abating, the master returned to his ship and, with the help of a boat crew from the frigate, brought her to port. Sir W. Scott held this "a case of very peculiar merit on the part of the original salvors, the master and the boy, by whose distinguished gallantry the property was rescued out of the hands of the enemy." He says further of the master: "He is the person whose service must stand highest in the estimation of the court; and I do not recollect to have seen any case of salvage in which personal merit of that species presented itself more strongly for encouragement and reward. On this part of the case I shall decree at least the usual salvage of a sixth."

He held the King's ship bound to give assistance as well against the elements as against the enemy. Further he said: "The value of the property saved is about £6239, — I shall give a sixth of that sum, or £1000 to the master and boy, in this proportion, £850 to the master and £150 to the boy; who, I observe, is described as his apprentice and rather above the condition of a common seaboy without articles." He allows half as much only to the King's ship and put the costs on the owners. The reward to the courageous master and the sturdy boy must gratify every reader, even yet, after one hundred and sixteen years have passed.

This was a case where the tribunal was that of one of the belligerents and the ship rescued was of that nation, therefore of belligerent ownership.

[3] 3 C. Robinson, 292; Scott's Cases Intern. L. p. 653.

The attorney general of the United States held a very similar doctrine, as we shall see, as to an American ship, which was neutral, but which was captured for breach of the pacific blockade of Mexican ports, and, before adjudication, rescued by her master. His conclusions, however, are based on the lack of power or duty on the part of neutrals to enforce belligerent rights which have not yet been consummated so as to change the title. The case was as follows:

The vessel, *Loue*,[4] Captain Clark, had entered the port of Matamoras and sailed thence for New Orleans, its port of final destination. On this homeward voyage the ship was captured by a French ship of a squadron blockading the port of Matamoras. Some days after capture, but before condemnation, Captain Clark rescued his ship and brought her safely to New Orleans. The French Government demanded that she be surrendered to it on account of breach of blockade and such rescue.

The Attorney General held that if it were admitted that a breach of blockade had occurred and a rescue, each of which was good cause for condemnation, "still it is a principle equally well established and recognized that the offense thus incurred never travels on with the vessel further than the end of the return voyage. If captured or recaptured in any part of that voyage, she is taken *in delicto*, and liable to be condemned; but if she terminates the entire voyage in safety, that liability has entirely ceased; nor can the captors demand her condemnation, much less her delivery to them." Also that by international law "capture transfers no property in the vessel and cargo to the captors" till condemnation. Therefore, whatever may be thought of the conduct of Captain Clark in entering the port of Matamoras and the subsequent rescue, the captors have no rights of property in the vessel and have lost all right to cause her to be condemned.

The opinion holds that by well settled principles of international law "it is made the duty of the captors to place an adequate force upon the captured vessel; and if from a mistaken reliance on the sufficiency of their force, or misplaced confidence, they fail to do so, the omission is at their own peril. No instance is known in which it has been regarded as a ground for asking such interposition as is now sought."

[4] See "Breach of Blockade Capture Rescue," opinion of Hon. Felix Grundy, Attorney General, Oct. 11, 1838, 3 Opinions Atty. Genl. 377.

The blockade in question was a "peaceful blockade" but, in the absence of precedents as to such blockade, the Attorney General based his opinion on the principles applicable "to ordinary blockades in time of war." Further the Attorney General held that the executive could not order such property of an American subject in the possession of the owner surrendered to a foreign government; that if there were any remedy open to the captor it was by judicial and not executive action.

The master and crew, it seems, are under no obligation to assist the prize crew in navigating the ship and if they refuse to assist and the prize crew, being inadequate, leave to the original master and crew the control of the ship and the latter turn her towards her own port, no penalty seems to attach. Thus in *The Pennsylvania*, M. Pherson, Master,[5] an American merchant ship from Trieste to Canton was captured by two British cruisers in the Mediterranean and three persons put on board. They were unable to navigate the ship, and the captain continued to direct her course according to the direction of the owners, refusing to carry her into Malta for adjudication, as required by the prize master. Just after passing Malta she was boarded by a third privateer and taken into Malta and condemned as having been rescued from the original captain.

Sir W. Grant held, as to the duty of the master and crew to navigate the ship to such port as the prize master directs at the peril of confiscation:

> We cannot see that any such duty is imposed on the master and crew. They owe no service to the captors and are still to be considered answerable to the owners for their conduct. It is the duty as well as the interest of the captors to make the capture sure; if they neglect it from any anxiety to make other captures or thinking the force already furnished sufficient, it is exclusively at their own peril. In this case the captain performs a duty he conceives he owes to the owners. He will not act against their interest, nor will he attempt to prosecute their interest by any violence on his part or that of his crew. Neither he nor they are bound to make resistance. The captors, therefore, are left to pursue their separate interests; they are unable to navigate the vessel and the captain resumes his command.

The decree of condemnation was reversed and the vessel was ordered restored.

[5] Acton's Report, Vol. 1, p. 34, High Court of Appeals, 1809.

A somewhat famous case of rescue arose during our Civil War, involving a British ship, *The Emily St. Pierre*.[6] She was captured by a United States ship of war March 18, 1862. She was on a voyage from Calcutta with orders to make the coast of South Carolina and ascertain whether or not it was still blockaded. If so, she was to go to New Brunswick, if not to Charleston. She was taken on the high seas, ten or twelve miles from shore, heading for Charleston. All her crew were taken out except the master, cook and steward, who were kept on board to testify before the prize court. A prize crew of two officers and thirteen men were put aboard and ordered to take her to Philadelphia. On the way the three prisoners rose against their captors, secured and disarmed them, gagged and put them in irons. After a voyage of thirty days through rough weather they brought the ship to Liverpool.

Mr. Adams, the minister of the United States, demanded of the British Government restitution of the ship. He denounced the rescue as fraudulent and an outrageous act, and he cited the decision of Lord Stowell in the *Catherine Elizabeth*[7] that such rescue, by a neutral master, violates the duty imposed on him by the law of nations. The British Government replied that it had no power to take the vessel out of the possession of her owner, whose rights had never been extinguished by the sentence of a prize court. That, if the rescue had failed, there was no doubt that the attempt would have rendered her liable to condemnation. That by international law only the belligerent could enforce belligerent rights and by the same law neutral nations were prohibited from enforcing them.

Professor Montague Bernard, to whom I owe the statement above,[8] adds:

> This correspondence came to a somewhat abrupt conclusion, partly due, as it appears, to a curious discovery made at the American Legation. It was found that a claim resembling that which the United States were making against Great Britain had, in the year 1800, been made by Great Britain against the United States, and that it had

[6] The Emily St. Pierre (1864), Dana's Wheaton, 475 Note, Scott's Cases, p. 655.

[7] Rob. V. p. 232.

[8] See An Historical Account of the Neutrality of Great Britain during the American Civil War, pp. 325 – 329.

been refused on the very grounds, which when urged by Lord Russell, had proved so unsatisfactory to Mr. Adams. (See p. 328.)

Professor Bernard, in a note quotes the reply of Mr. Pickering, Secretary of State, of the United States, in the cases of the brigantine *Experience*, Heurt, Master; the ship, *Lucy*, James Conolly, Master, and the brigantine *Fair Columbia*, Edward Cary, Master, rescued from British captors by their masters, which refers the British Government to the American "tribunals of justice, which are open to hear the captors complaints," but holds "no precedent is recollected, nor does any reason occur, which should require the neutral to exert its power in aid of the right of the belligerent nation in such captures and detentions."

The crew of a captured merchant vessel is not ordinarily to be held as prisoners of war. The status of neutrals engaged in running the blockade of our Southern coast during our late Civil War, after some errors and just complaints, was settled July 25, 1863, by a note of President Lincoln to the Secretary of the Navy, as follows:

> You will not in any case detain the crew of a captured neutral vessel, or any other subject of a neutral Power on board such vessel, as prisoners of war or otherwise, except the small number necessary as witnesses in the prize court.
>
> Note: The practice here forbidden is also charged to exist, which if true, is disapproved and must cease.

The President added:

> What I propose is in strict accordance with international law, while if it do no other good, it will contribute to sustain a considerable portion of the present British Ministry in their places, who, if displaced, are sure to be replaced by others more unfavorable to us.[9]

It should be remarked, *en passant*, that Mr. Lincoln, with all his great qualities, was profoundly unacquainted with international law, and depended for direction upon his Secretary of State, Mr. Seward. The latter, with all his small qualities, was equally uninformed on this topic and constantly neglected to seek information from the books. Mr. Lincoln's Secretary of the Navy, Mr. Welles, took far greater

[9] See article by this writer, Yale Law Review, Dec. 1904, p. 84.

pains to investigate questions arising in international law, and complained constantly of the errors of the Department of State.

Instructions in full accord with Mr. Lincoln's directions were issued by the Secretary of the Navy May 16, 1864, and *bona fide* neutrals on neutral ships captured were held exempt from treatment as prisoners of war and entitled to immediate release.[10]

The instructions issued in 1898 by our Secretary of the Navy in the Spanish War when the Cuban coast was blockaded, which instructions were prepared by our Department of State, are to like effect and declare: "The crews of blockade runners are not enemies and should be treated not as prisoners of war, but with every consideration."

The practice in the Russo-Japanese War at Port Arthur, was the same, as I was assured by letter from the United States Consul at Yokohama, dated July 27, 1904, though this was rather a siege than a blockade. The Japanese Embassy, however, advises me that the practice was like our own as to the crews of neutral ships captured while carrying contraband, and Russia adopted the same rule.

The neutral crew of a neutral ship being brought in for condemnation as a prize, cannot, therefore, be held to be prisoners of war in all respects. Their situation, however, is, until they can be released, somewhat analogous, only more favorable; therefore, we may with profit inquire what treatment by way of repression, or punishment for escape, or its attempt, prisoners of war may be lawfully subjected to.

By the Brussels Declaration, "escaped prisoners who are retaken before being able to rejoin their own army, or before leaving the territory occupied by the army which captured them, are liable to disciplinary punishment."

"Prisoners, who after succeeding in escaping, are again taken prisoners, are not liable to punishment on account of their previous flight," [11] but Professor Bordwell (p. 241) says:

> The prisoner, however, is not justified in using violence in attempting to escape, and if he resorts to such methods, may be punished under the first paragraph of the article, according to the laws, regulations and orders in force in the army of the state into whose hands he has fallen.

[10] Official Record U. S. & Confederate Navies, Series 1, Vol. 10, pp. 60–61.

[11] Bordwell's Law of War, p. 242.

The regulations adopted at The Hague, in 1899, as to the Laws of Land War are almost identical with those of the Brussels Declaration; thus, Art. VIII:

Prisoners of war shall be subject to the laws, regulations and orders in force in the army of the State into whose hands they have fallen.

Any act of insubordination warrants the adoption, as regards them, of such measures of severity as may be necessary.

Escaped prisoners, recaptured before they have succeeded in regaining their army, or before quitting the territory occupied by the army that captured them, are liable to disciplinary punishment.

Prisoners, who, after succeeding in escaping are again taken prisoner, are not liable to any punishment for the previous flight.[12]

Our own Instructions to Armies in the Field provide as follows:

A prisoner of war who escapes, may be shot or otherwise killed in his flight, but neither death nor other punishment should be inflicted upon him simply for his attempt to escape, which the law of war does not consider a crime.

Woolsey [13] says:

Persons escaping from captivity, and retaken, or even recaptured in war, are not held to merit punishment, for they only obey their love of liberty.

The late General George B. Davis,[14] Judge Advocate General of the United States Army, observes:

A prisoner of war in attempting to escape, does not commit a crime. It is his duty to escape if a favorable opportunity presents itself. It is equally the duty of his captor to prevent his escape, and he is justified in resorting to any measures, not punitive in character, that will best secure that end. A prisoner of war may be killed in attempting to escape. If recaptured his confinement may be made more rigorous than before.

This is also quoted by Rear Admiral Stockton, with apparent approval.[15]

Our own "Instructions for the Government of Armies of the United States in the Field" (Sub. 59) provide:

[12] See 2 Westlake's International Law, p. 64.
[13] International Law, p. 216.
[14] See Davis' Elements of Int. Law, 3d ed. p. 315.
[15] Stockton's Outlines of International Law, p. 320.

A prisoner of war remains answerable for his crimes committed against the captors, army or people, committed before he was captured, and for which he has not been punished by his own authorities.

This, however, does not seem applicable to offenses after capture.

The Convention Relative to Certain Restrictions with regard to the Exercise of the Right of Capture in Naval War, adopted at The Hague in 1907, by Articles 5 and 6 clearly indicates that the officers and crew of an enemy ship, if of belligerent nationality, are made prisoners of war, if not paroled, but this does not apply to the crews of neutral vessels.

The provisions of The Hague Convention as to disciplinary punishment of prisoners attempting escape are not understood to include death; but plots, rebellion, or riot, would bring a prisoner under the former part of the article and the penalty of death might be incurred in them.[16]

Professor Takahashi says:[17]

It is a question whether sailors of merchantmen may be prisoners or not. . . . Conforming to the opinion of many publicists, there is no objection theoretically for treating sailors of merchantmen as prisoners, and practices agree in several cases.

He says further:

During the Russo-Japanese War, Japan was more liberal than Russia. Only crews of merchantmen, who formerly served in the navy, were treated as prisoners, and others were released. On the 21st of February 1904, the Japanese Minister of the navy gave instructions to the commander of the Sasebo naval stations that when Russian vessels were confiscated as rightful prizes at the prize court, their masters and crews may be released on parole not to serve again during the same war, and they may be given passage from Nagasaki to Shanghai if they want it, in all cases except contraband persons and those whom it was considered necessary to intern.

The Minister issued rules of practice in such cases which are given, with a list of eight Russian ships captured and of 414 of their crews released.

[16] 2 Westlake's International Law, 64; Bordwell's Law of War, 241–2; Hershey's Essentials of International Law, p. 376.

[17] International Law Applied to Russo-Japanese War, p. 138.

Professor Takahashi says further:

> Japan captured Russian merchantmen, but did not destroy a single vessel. Contrary to this, Russians sank all Japanese merchantmen they saw, and few were captured. The crews on board of vessels they sank were treated as prisoners of war.

He gives a list of six such vessels so treated. This was the last naval war before the Hague Conference of 1907.

At page 131 Professor Takahashi also gives a table showing offenses and punishment of the Russian prisoners of war. There were 126 attempts to escape by army officers and 78 by naval officers. Of these 188 were punished by confinement to barracks, others by imprisonment, open arrest or reprimand; none by death or other penalty than as above.

It is almost impossible as yet to consult or collate the rulings in the present war, information being so largely unpublished and withheld. One English case may be cited, however.

In April, 1915, Lieutenant Andler of the German Navy was placed on trial at Chester, England, for attempt to escape from the internment camp. Captain Andler and Lieutenant Leben, after escaping from the camp where they were interned, wandered a week in the Welsh hills, but were finally recognized and captured.

Andler was placed on trial before a court of five English officers, and pleaded guilty. When asked if he wished to make any statements in mitigation of punishment he said that, according to the Hague Convention, he was only subject to disciplinary punishment. He seems to have claimed that the convention made a difference between disciplinary punishment and other punishment, "that it provided for escaped prisoners of war who were retaken merely such disciplinary punishment," but on the other hand that paroled prisoners recaptured, bearing arms against the government which had released them, forfeited their right to be treated as prisoners of war and might be put on trial before the courts.

After some controversy and after he had been advised that any punishment imposed by the court would require confirmation by the general commanding the district, he still insisted that disciplinary punishment can only be inflicted by one individual, and formally

protested against being tried by the court. He said he could be tried only by his commandant or the immediate superior of the commandant.

The court, apparently after consideration, overruled his objections. It considered its sentence in private.[18]

A young American officer of the French Army at home on a brief furlough, informs the writer that certain French aviators escaped from custody as prisoners of war in Germany by shooting two sentinels. The French authorities employ them elsewhere than at the front, fearing that, if again captured by the Germans, they might be put to death.

The conclusion is reached that the master and crew of a captured vessel, in attempting the rescue of their ship and cargo, are guilty of no crime so far as the laws of their own country are concerned, or so far as any law of any neutral country is concerned; that the attempt, however, may be resisted, even to the death by the captors; that, not accompanied by violence, no serious penalty attaches, further than closer confinement; but if accompanied by violence, punishment may be inflicted by the captor according to his laws and regulations, if the prisoner does not escape beyond his jurisdiction.

CHARLES NOBLE GREGORY.

[18] London *Times*, April 24, 1915, quoted Stowell & Munro's International Cases, War and Neutrality, p. 207.

THE HELLENIC CRISIS FROM THE POINT OF VIEW OF CONSTITUTIONAL AND INTERNATIONAL LAW[1]

PART II

THE summary review in the previous article of the historical events which culminated in the creation of the Hellenic Kingdom, and the vicissitudes which Greece underwent from the time of the declaration of her independence up to the year 1911, when her Constitution of 1864 was revised, plainly show that the Hellenic people never for a moment thought of submitting themselves to autocracy, but on the contrary asserted their determination to live under a democracy. Hence the murder of their first president, or governor Capodistrias, the deposition of their first king, Otho, and the abjuration now by a large section of the Hellenic nation both in and out of Greece, of their present ruler, Constantine, who, under the cloak of the Constitution, rules the part of the country still under his dominion, not as a constitutional King of the Hellenes, but as an absolute monarch.

King Constantine, in answer to his critics, who upbraid him for the manner in which he wields his royal power, asserts that in exercising his prerogatives he adheres strictly to the letter of the Constitution and repudiates the charge of unconstitutionality for any of his actions. It should be recalled that the sovereign of Greece claims the exclusive right of conducting the foreign affairs of the country,[2] leaving its internal administration to the care of the "servants of the Crown," namely, his Ministers, and he contends that in case the latter refuse to carry out the "royal policy" he has the right to dispense with their services, it being immaterial whether such "servants of the Crown" enjoy or not the confidence of the duly elected representatives of the nation.

Furthermore, the King of the Hellenes asserts that, in order to carry out his policy, he has the right to exercise the prerogative con-

[1] Continued from the January, 1917, number, p. 46.

[2] See this JOURNAL for January, 1917, p. 70, note 56.

ferred on the Crown by the Constitution (Art. 37), namely, to dissolve the Boulé (the legislature) and order new elections; and that, if the people by their votes again give a majority to the political party to which such ministers are affiliated, thereby indorsing the policy of the latter and disapproving that of the King espoused by another group of politicians, the King still claims that he is not under any obligation to bow to the national will, but that he can again and again dissolve the Legislature until he can secure a body that is willing to support a cabinet which will carry out the will of the monarch. In short, King Constantine arrogates to himself the right of shaping the destinies of the nation, of declaring war or remaining at peace, without any interference whatever from the people or their representatives.

Such being the contention of the King of the Hellenes, it is pertinent to inquire whether the attitude taken by him from the time of the declaration of the present European War up to the present time, with the consequent "royal actions," can be justified according to the Constitution of Greece, which, on his accession to the throne, he undertook under oath faithfully to maintain.

The bone of contention, so to speak, between King Constantine on the one hand, and Mr. Venizelos and the nation generally on the other, is the difference in their interpretation of the royal prerogatives embodied in the Constitution. The view of the Greek sovereign is that the letter of the instrument does not need any construction and that all rights therein conferred on the Crown are to be taken literally; while the contention of the Cretan statesman and his party is that the provisions of the Constitution must be construed in accordance with the existing constitutional usages in Greece, and also those in force in other countries enjoying constitutional government, which may be summarized in the expression or dictum that "the Prince reigns but does not govern."

Limiting ourselves to the actual controversy between ruler and ex-premier, we see that the latter contends that, after the general elections of June, 1915, the King should have abided by the national will; that the dissolution of the Boulé in the course of the year 1915 was decreed by him (the King) because his Majesty had disagreed with the policy of Mr. Venizelos and his party, who advocated the participation of Greece in the European War on the side of the Triple, now Quadruple,

Entente; and that the people by their votes given in said elections, indorsed the policy of Mr. Venizelos.

It should be noted that both before and during the electioneering campaign of March–June, 1915, the divergence of views between the King and Mr. Venizelos was an open secret, it being hotly discussed both in the press and in the speeches to the constituents. It was also the catchword of the politicians who supported the King's policy by warning the voters that if they voted for the Venizelos candidates Greece would enter the European War, but that if they cast their votes for the "party of the King," they would be spared that ordeal and continue to follow their peaceful vocations. The result of these elections, notwithstanding the royal support, was a complete victory for Mr. Venizelos and a humiliating defeat for Constantine. Hence the subsequent high-handed proceedings of the sovereign in again dissolving the Legislature in order to impose upon the nation his own personal policy, namely, a so-called "benevolent neutrality" towards the Allies in appearance, but in fact, as it has been now attested, to give secret help to the Central Powers and particularly to Prussia, the fatherland of the Queen of the Hellenes.[3] Hence the irreconcilable divergence of views between the soldier sovereign and the jurist statesman, the one asserting the right to use the royal prerogative as the letter of the Constitution prescribes, the other contending that both tradition and universal practice militates against such exercise.[4] Hence the chasm created between a sovereign imbued with the idea of the divine right of kings, and the citizen nurtured in the modern school of democracy repudiating indignantly such obsolete notions of government. Hence the abandonment of King Constantine and his adherents to their fate

[3] Proofs for this assertion will be adduced in a subsequent article.

[4] After the constitutional régime inaugurated in France by the Charter of 1814, a controversy arose between the two political parties of the time, namely, the Royalists and the Liberals, the former contending that the Charter should be applied literally, the latter on the contrary asserting that it should be carried out according to its spirit. It was then that Thiers laid down the principle that the King reigns but does not govern. See on this point the learned treatise of Professor J. Barthélémy entitled *l'Introduction du Régime Parlementaire en France* (1914), p. 78. Barthélémy, however, tells us that the majority of the writers indorse the other maxim, — which does not differ much in substance from the former — that "the King does not govern; but he influences the government." *Ibid.* p. 80.

in old Greece, to suffer repeated humiliations, to face starvation, to submit to the invasion of the territory of Hellas by friends and foes alike, and the establishment of a new government by the elite of the nation in New Hellas, in order to save the national honor and preserve the territorial integrity of the Kingdom with the possibility, be it remote, of gathering under the ægis of the Hellenic state some of the remnants of Hellenism still under a foreign yoke or dominion.

In order to understand the controversy it is necessary to refer to the parliamentary systems of some of the European states, from which Greece borrowed her Constitution, and particularly to that of England, which has undoubtedly been the prototype of all modern constitutional governments.[5] A French writer states that the English Constitution was appealed to by all the oppressed nations and acclaimed in every revolution, that every state that was formed during the course of the nineteenth century copied it more or less faithfully, and that Belgium adopted it in 1830.[6] A contemporary English writer says that Italy and Belgium (from which last country Greece borrowed her Constitution), with some variations, "remodeled their Constitutions in the last century with the express object of assimilating them to the English." [7]

To revert to our subject, the crux of the controversy between King Constantine on the one hand, and Venizelos and the Greek nation on the other, is the construction or misconstruction of the provisions of the constitutional charter. The King ignores entirely the parliamentary customs and usages, known in England as the understandings or con-

[5] E. Freeman, The Growth of the English Constitution (1898), pp. 18–19; Bryce, Studies in the History of Jurisprudence, p. 125; Gladstone, Gleamings of Past Years (1879), Vol. I, p. 228; Sir Henry Maine, Popular Government (1897), pp. 9–14; Lowell, Governments and Parties in Continental Europe, Vol. I, pp. 1–7; Hearn, The Government of England (1867), p. 2; Guizot, *Histoire des Origines du Gouvernement Représentatif en Europe* (1851), *première leçon*, p. 11; E. Boutmy, Studies in Constitutional Law, tr. by E. M. Dicey (1891), p. 3; Glasson, *Histoire du droit et des Institutions politiques, civiles et judiciaires de l'Angleterre*, Vol. VI, p. 8; A. Esmein, *Éléments de droit Constitutionnel Français et comparé* (1906), pp. 45 *et seq.*; Duguit, *Traité de droit Constitutionnel*, Vol. I, pp. 411, 421–422.

[6] P. Matter, *La dissolution des Assemblées Parlementaires*, pp. 217–218; see also Jellinek, *Allgemeine Staatslehre* (1914) p. 704.

[7] Sidney Low, Governance of England (1904), pp. 44–47.

ventions of the Constitution, namely, the political ethics by which a constitutional chief of state should be guided in the exercise of the discretionary powers conferred on him by the Constitution. In England, where parliamentary government is undoubtedly far more advanced than in any other country, these precepts and usages are now more religiously guarded than was the case in former times, having by successive national awakenings and revolutions been firmly and solidly riveted into the English body politic.

As a matter of fact, such constitutional customs or maxims exist in every country endowed with a constitution, be that a kingdom or a republic. If a sovereign of a constitutional state, whose Constitution is unwritten or flexible, written or rigid, to use the words of Lord Bryce, would, in the first instance, use his prerogative without any restraint whatever, and in the second, adhere strictly to the letter of the Constitution, he would undoubtedly become an absolute monarch. Nor is the case different with a republic, where the literal exercise of the powers conferred on a President by the Constitution would make him practically a dictator. By the charters of every constitutional country large powers are granted to the chief of state, the founders or framers of the Constitution thinking, rightly or wrongly, that such exalted personages would use these prerogatives with discretion, and that in the exercise of their power they would be guided solely by the spirit and not adhere strictly to the letter of the Constitution.

Freeman in his excellent work on the growth of the English Constitution, commenting upon the customs and usages above referred to, tells us that in England alongside the Royal charters or Acts of Parliament . . . "there has grown up a whole code of political maxims universally acknowledged in theory, universally carried in practice . . . but which are hardly held less sacred than any principle embodied in the Great Charter or in the Petition of Rights." "In short," he adds, "by the side of our written law there has grown up an unwritten or Conventional Constitution." According to the learned English historian, to overlook these maxims would not be a violation of the written law, but if a Minister continues to hold an office notwithstanding the disapproval of his policy by parliament he "would be universally held to have trampled underfoot one of the most undoubted principles

of the unwritten but universally accepted Constitution." In conclusion, he says, "the unwritten Constitution makes it practically impossible for the Sovereign to keep a Minister in office of whom the House of Commons does not approve, and it makes it almost equally impossible to remove from office a Minister of whom the House of Commons does approve." [8]

Professor Dicey, in his masterly exposition of the English Constitution, deals at length with these usages and customs, which are called by him "Conventions of the Constitution," a name since adopted by various authors. He summarizes the examples of Constitutional understandings or Conventions of the Constitution given by Freeman, and says: "A Cabinet, when outvoted on any vital question, may appeal *once* [the italics are ours] to the country by means of a dissolution. . . . If an appeal to the electors goes against the Ministers they are bound to retire from office, and have no right to dissolve Parliament a second time." All these rules, he says, or most of them, are for the purpose of determining "the mode in which the discretionary powers of the Crown (or of the Ministers as servants of the Crown) ought to be exercised." Referring to the ultimate object of the constitutional precepts, Dicey says that "their end is to secure that Parliament or the Cabinet, which is indirectly appointed by Parliament, shall in the long run give effect to the will of that power which in modern England is the true political sovereign of the State — the majority of the electors, or (to use popular though not quite accurate language) the nation. . . . The electorate is in fact the Sovereign of England." In conclusion, he says that "our modern code of Constitutional morality secures, though in a roundabout way, what is called abroad the Sovereignty of the people." [9]

Sir William Anson, commenting upon the duty of Ministers to retire from office if they are defeated on a vital question, or to ask the King to dissolve Parliament, if they have reason to believe that the House of Commons does not represent the feelings of the country,

[8] Freeman, *ibid.*, pp. 112–119. The same views are expressed in his Historical Essays (1892), Fourth Series, pp. 483–484.

[9] Dicey, Introduction to the Study of the Law of the Constitution (1915), pp. 416–418, 422–426.

says, "Ministers are not only the servants of the King, they represent the public opinion" and therefore, "the King, as represented by his Ministers, must, by the conventions of the Constitution, work in harmony with public opinion as represented by the members of the House of Commons." [10]

The existence of these constitutional customs in every country endowed with a liberal constitution, whether all its constitutional liberties are covered or not by the letter of the charter, is beyond discussion. They exist not only in states ruled by a sovereign but also in republics. The checkered political life of France and the struggles of its people for political freedom against the encroachments, from time to time, of their so-called constitutional sovereigns, proves their existence in that country.[11]

Their existence even now in republican France is attested by her writers. Thus, the author whom Dicey mentions (p. 23, note 1) tells us that although according to the letter of the present Constitution of the French Republic, the President appoints all public functionaries, as a matter of fact the exercise of that power is left to the Ministers. Again, although the Constitution does not prohibit the President from dismissing the Ministers, still he does not actually exercise that right because the Chamber of Deputies is really the controlling factor

[10] The Law and Custom of the Constitution (1911), p. 383.

Jellinek observes that Hatschek, the German author on the English Constitution (*Englisches Staatsrecht*, Vol. I, pp. 542 *et seq.*) has in a very suggestive way undertaken to show that part of these so-called conventions or rules are really legal maxims. "For us," adds Jellinek, "it is yet an open question how far these Constitutional or political ethics contain customary rights or legal maxims." (Jellinek, *Allgemeine Staatslehre* (1914), p. 703.)

A French writer on British political institutions, using rather allegorical language, says, "These usages, conventions or better understandings are the most invisible and most important elements of the Constitution. They do not create or destroy; they do not change the letter of the law, but they distort its spirit. They are born one day and suddenly disappear the next. One may think that they are dead, but they only slumber until the time when there is occasion to bring them to life." (Comte de Franqueville, *Le Gouvernement et le Parlement Britanniques*, Vol. I, 1887, p. 73.)

[11] A notable example of comparatively recent times is that of Charles X (King of France), who was compelled to abdicate because he transgressed the constitutional understandings.

in the matter, and the President can only dispense with the services of a Minister upon the proposal and with the consent of the Cabinet.[12] Other French constitutionalists indorse these views and, as Professor Duguit well observes, most of the powers conferred on the President of the French Republic are exercised by his Ministers, who in turn are under the control of Parliament.[13] Other French authors also agree that the right given to the President by the Constitution "to dispose of the armed forces of the Republic" is now a mere "fiction" and "not in harmony with the present regime." [14] In the words of Esmein, if "a President of the French Republic, being ignorant of military art, would claim the right conferred on him by the Constitution to actually command the army in time of war and thereby jeopardize the safety of the country, such an action would be considered high treason.[15] The same observation applies to the President of the United States.

That such constitutional customs exist also in the United States, notwithstanding the rigidity of its Constitution, is quite evident to any student or observer of political institutions. Thus, Lord Bryce in his classical work on the Constitution of this country, after referring to the existence of constitutional conventions or understandings in England, which he considers as being "no less essential to the smooth working of the English Constitution," points out that they even exist in the United States where there is a written Constitution. "Some of the features," he says, "of American Government . . . rest neither upon the Constitution nor upon any statute, but upon usage alone." As an example, he mentions the fact that the Presidential electors have lost by usage the right "of exercising their discretion." [16] "It is natural," says the same writer, "it is indeed essential that there should be in every country such a parasite growth of usages and conventions round the solid legal framework of government." [17]

[12] H. Chardon, *L'Administration de La France* (1908), pp. 86–93.

[13] L. Duguit, *Traité de Droit Constitutionnel* (1911), Vol. II, p. 435. Also A. Esmein, *Éléments de Droit Constitutionnel Français et comparé* (1906).

[14] Duguit, *ibid.*, II, p. 439; Chardon, *ibid.*, p. 94.

[15] Esmein, *ibid.*, p. 604, note 8.

[16] James Bryce, The American Commonwealth, Vol. I (1910), p. 383.

[17] *Ibid.*, p. 386. See also on the same point, James Bryce, Studies in History and Jurisprudence, p. 124.

Professor Dicey observes that "the understanding that an elector is not really to elect has now become so firmly established, that for him to exercise his legal power of choice is considered as a breach of political honor too gross to be committed by the most unscrupulous of politicians." "The power of an elector to elect," he adds, "is as completely abolished by constitutional understandings in America as is the royal right of dissent from bills passed by both Houses of the same force in England."[18] Distinguished American constitutionalists are not less emphatic in their assertions as to the existence of these conventions. Thus, the learned author of the *Government of England* says, "Customs or conventions of this kind exist, and in the nature of things must to some extent exist, under all governments. . . . The conventions do not abrogate or obliterate legal rights and privileges, but merely determine how they shall be exercised. . . . In the main they are observed because they are a code of honor."[19] President Wilson, referring to this point, says, "It is at once curious and instructive to note how we have been forced into practically amending the Constitution without amending it. Our method of choosing Presidents is a notable illustration."[20]

A Belgian author asserts that custom is considered in Belgium as one of the sources of public law. He says:

> It is custom which distinguishes the institutions of one country from another when the texts are identical or similar. For instance, who could sound [the depth] of the political abyss separating the two Kingdoms (Prussia and Belgium) by the mere reading of the Belgian and Prussian Constitutions?
>
> The conception even of Constitutional royalty and Parliamentary Government consists entirely of customs. It has been repeatedly said that the Parliamentary regime, unwritten in the country of its origin, has remained such in all the countries that have adopted it. It is sufficient to mention the rules of the political responsibility of the Ministers before the Chambers, which are not prescribed in any part of our Constitution. As we cannot conceive a Ministry selected by the King outside the Parliamentary majorities, so we cannot understand the maintenance in power of a cabinet when the majorities, have changed. The existence and the functions of a Prime Minister are not provided in the text (of the Constitution). It is also custom

[18] Dicey, *ibid.*, p. 29; also Anson, I, *ibid.*, p. 7.

[19] L. Lowell, The Government of England, Vol. I (1912), pp. 9, 10, 11, 12.

[20] Woodrow Wilson, Congressional Government, pp. 242–243.

that imposes upon the King the duty of dissolving the Chambers or one of them, in case of conflict between them or the Ministry. Lastly, the whole system of Cabinet Government in its essential forms and minutest features is the work of custom, born and developed according to the rules so well laid down by the historical school.[20a]

Greek constitutionalists also admit the existence, in Greece, of such customs. According to a distinguished Greek jurist, the sources of constitutional law are the written text of the Constitution and the unwritten law which is formed in conformity with the spirit of the text and the national traditions. These customs, he says, which are gradually put in practice, constitute the parliamentary law "whenever they are founded on right reason and legal science." [21]

Professor Saripolos, of the University of Athens, in enumerating the privileges of the Greek Legislature, says:

The control of the government, which is regulated by the Constitution and developed by the conventions of the Constitution, refers to the responsibility of the Ministry to the Legislature. . . . The Legislature, or rather a committee, namely, the Ministry, which as a matter of fact is elected by it, has united in its hands politically the legislative and executive authority, and particularly the president of this committee, namely, the Prime Minister, who exercises really the prerogatives which as a matter of form belong to the King only or to the King and the Legislature. The latter has become the source and dispenser of authority, after having appropriated to itself the prerogatives which, according to the Constitution, belong to the King. This preponderance of the Legislature (over the King) is due to two causes: to the revolutionary source of the Constitution and the Dynasty, and also the lack of a Senate or second Chamber.

He further tells us that the Constituent Assembly which adopted the Constitution of 1864, in imitation of that of France of 1791, created only one chamber in order to have a strong body against the King, so that by its unity it could wield with force the sovereign will of the people, which it was thought would have been weakened by the existence of another legislative body.[21a]

[20a] Paul Errera, *Traité de droit Public Belge* (ed. 1909), pp. 5 and 208.

[21] G. N Philaretos, an article entitled "Form of Hellenic Government" in Political and Parliamentary Monthly Review (in the Greek language), ed. by G. Cafandaris, Book II, April, 1916, p. 140.

[21a] N. N. Saripolos, *Das Staatsrecht des Königreichs Griechenland* in *Das Öffentliche Recht der Gegenwart*, Vol. VIII, pp. 47–48.

The conclusion to be drawn from the above exposition of the constitutional customs and usages prevalent in constitutional countries is that the provisions of the Constitution cannot always be applied literally, but are often enforced according to their traditional construction and modern parliamentary practice. A literal application of all the provisions of a Constitution would transform a constitutional king into a real autocrat, and the system of government would become entirely autocratic. The time has fortunately passed when a constitutional sovereign can with impunity either by subterfuge or force shake off the constitutional garb and, in the terse language of Sir Walter Raleigh, "Turk-like tread under his feet all the national and fundamental laws, principles and ancient laws of his people." [22]

Having in a general way reviewed the constitutional customs or understandings which are, in every country, held as being not less binding than written provisions, let us now inquire into the particular contention of the King of the Hellenes that he has the absolute right to conduct the foreign affairs of the kingdom, irrespective of the views of his Ministers enjoying the confidence of the legislature; and that, in case of divergence of opinion between himself and his Ministers, he has the right to dismiss them, and to dissolve the legislature whenever the representatives of the nation support a Cabinet which does not shape the foreign policy according to the directions and will of the Crown.

The King, in an interview with the correspondent of the *Atlantis*, a Greek paper published in New York, in February, 1916, said: "When I dissolved the Boulé, I acted according to the Constitution, and if I dissolve it again, I shall always be acting according to the Constitution . . . which I took an oath to maintain first amongst the Greeks." [23] Another utterance of King Constantine made to the editor of the *Esperine*, of Athens, indicates his conception of the rights of a constitutional sovereign. "I will remain," he said, "steadfastly to my present policy as long as I think that the war is not in the interest of Greece. I shall not bend, in order to throw the country in the war, as long as I am not convinced by the events (of the war) that it is in the interest of Greece to enter the war. I shall persist in this stand (which

[22] Quoted by Hallam, The Constitutional History of England (1897), Vol. I, p. 275.
[23] *Atlantis* of May 16, 1916; also *Keryx* (of Athens, May 13, 1916).

I take) no matter what happens within the circle of events upon which my supposition is based in regard to the policy to be followed." [24]

But during the recent attack of the Greek troops (December 1, 1916) against the international contingents at Athens, the King told the Ministers of the Allies, who remonstrated with him for not having kept his promise, that "he was not an Emperor of China but a Constitutional King." When the Ministers reminded him of his former statements to them and to others that all his commands and orders were executed, "Oh," said Constantine, "times were different then. It is not so at present." [25] The King quite recently, in another interview given to the correspondent of the Associated Press, admitted that he was only a soldier and did not understand politics.

Such being the stand taken by King Constantine, it becomes necessary to see what is the practice in other constitutional kingdoms, both in regard to the conduct of the foreign affairs of the country and to the right of a sovereign to dismiss the Ministers and dissolve Parliament.

The fundamental and basic rule in every Kingdom endowed with a liberal Constitution is that "the King reigns but does not govern." This principle is now so engrafted in every free country that to depart from it in the slightest degree would be considered as a wanton violation of the liberties of the people and an infringement of national sovereignty. It is from this maxim that flow all the limitations upon royal power and upon the faithful observance of it depends the maintenance of popular government. A corollary to this maxim is the irresponsibility of the Sovereign and the responsibility of the Ministers.[26]

If we look for guidance to England, where the sovereign *ab antiquo* has wielded a great influence in the shaping of the foreign policy of the country, we find that even there, notwithstanding the traditional reverence for the wisdom of the Crown, the final word on such questions is with the responsible Ministers and ultimately the Cabinet enjoying

[24] Quoted by *Atlantis* of May 12, 1916.

[25] From an interview given to Mr. John Bass of the Chicago *Daily News*, January 24, 1917, reprinted in the *Figaro* of January 26, 1917.

[26] "The doctrine," says Macaulay, "that the sovereign is not responsible is doubtless as old as any part of our Constitution. The doctrine that his Ministers are responsible is also of immemorial antiquity." (History of England, 1907. Vol. IV, p. 122.)

the confidence of Parliament, or better still with the House of Commons. To quote Freeman again, "in foreign as in domestic affairs, the wish of the two Houses of Parliament or (when they differ) of the House of Commons ought to be followed." [27] All writers agree that the Crown has the right to advise on public matters generally, and on foreign affairs in particular, but between advising and controlling there is a great difference. "It is essential to our liberties," says Lord Macaulay, "that the House of Commons should exercise a control over all the Departments of the Executive Administration." [28] A distinguished Parliamentarian says, "The influence of the Crown must not be permitted to obscure in any degree the responsibility of the Minister who ultimately tenders the advice upon which action is taken," such a Minister "possessing the confidence of the House of Commons which represents the will of the nation." "If," he adds, "on rare occasions of transcendent importance the Crown sets aside the will of the Minister, this step is defensible on the assumption that the Minister no longer represents the national will." [29] Another English constitutionalist summarizes the question by saying: "In every act of state the King is guided by the advice of his counsellors; and in their removal he is guided by the advice of his Parliament." "The fundamental principle of that policy," he adds, "is that the discretion of the Crown shall be exercised in conformity with the wishes of the nation." [30] "The Cabinet," says Dr. Lowell, "must carry out its own policy; and to that policy the Crown must submit. . . . The King may, of course, be able to persuade his Ministers to abandon a policy of which he does not approve, . . . but if he cannot persuade them, and, backed by a majority of Parliament, they insist upon their views, he must yield." [31]

Sheldon Amos, after repeating that Parliament retains in its hands

[27] Quoted by Dicey, *ibid.*, p. 417. [28] Macaulay, *ibid.*, IV, p. 542.

[29] L. Courtney, The Working of the Constitution (1907), pp. 125, 126.

[30] William Hearn, The Government of England (1867), pp. 115, 149. See also Anson, *ibid.*, Vol. II (1891), p. 290, who indorses the view that foreign affairs are "subject always to the collective advice of the Cabinet. The same writer (Anson), referring to the right of the King to dismiss his Ministers, says, "They have, it is true, been summoned, and continue to hold office by the pleasure of the Crown, but it is to the majority of the House of Commons and not to the will of the Crown that they look to enable them to retain their power." (*Ibid.*, Vol. I, p. 43.)

[31] A. L. Lowell, The Government of England (1912), Vol. I, p. 31.

the power of guiding, generally, the policy of the country, comments upon the results of a policy beyond the control of the nation, which is exactly the case in Greece, where the present King has usurped both the domestic administration and the guidance of the foreign affairs of the state. The following remarks of the distinguished English jurist, therefore, apply *mutatis mutandis* to the actual political controversy in Hellas:

> When, behind the responsible Ministers, there is a subtle, undefined, and therefore unlimited influence, . . . when this influence is not of the mere formal consultative sort, . . . but . . . takes all the innumerable shapes of suggestions, . . . and the scarcely concealed show of farsighted political aims not coincident with the policy of the Cabinet, or of Parliament, or of the country, . . . there is a factor introduced for which no theory of the English Constitution in its present form can possibly find a place. It is, indeed, a factor which, so far as it operates, must to that extent be the very negation of the Constitution and steadily tend to its destruction.[32]

An excellent critic of Sir T. E. May's *Constitutional History of England* (Vol. I), writing in 1862, says that "a King who personally assumes the direction of affairs, and requires his ostensible Ministers to be the mere agents of his will, may be an able ruler, but unless he has a corrupt and servile parliament to deal with, he takes a course which is sure to bring the most important members of our constitutional system in dangerous collision." [33] The Greek Constitution of 1864, following the Belgian Constitution, adopted the principle of national sovereignty.

As Article 25 of the Belgian, so Article 23 of the Greek Constitution laid down the rule that "all powers emanate from the nation." [33a]

According to a commentator on the Belgian Constitution, the meaning of Article 25 "is a declaration of independence, an assertion of the liberty of the country and of the fall of every other foreign authority in Belgium." It is a solemn act of taking possession of the sovereignty.[34] Another Belgian author in reviewing the original sources

[32] Fifty Years of the English Constitution (1880), pp. 316, 317.

[33] The *Edinburgh Review* of January–April, 1862, Vol. CXV, p. 229.

[33a] For the Belgian Constitution, See Dareste, *Constitutions Modernes*, Vol. I, p. 77 *et seq.*; for the Greek Constitution, See Diplomatic and Consular Guide of Greece (in Greek, 1911), pp. 2 *et seq.*

[34] Orban, *Le Droit Constitutionnel de la Belgique*, Vol. II, p. 277; see also J. J. Thonissen, *La Constitution Belge* (1879), pp. 109 *et seq.*

of Article 25 says that the report of the committee "on the powers of Government in Belgium," which was submitted at the time of the drafting of the Belgian Constitution, stated distinctly that it was guided by the French Constitution of 1791.[35] A Belgian professor of constitutional law asserts that the Constitution of Belgium "wrought a revolution in state constitutions on account of its democratic principles founded on the French Constitution of September 3, 1791 and also on that of the United States."[36] As the Constitution of Greece is in its main lines a reproduction of the Belgian Constitution which, in its turn, derived its sources from the principles of the French Revolution and the French Constitution of 1789, it is evident that the sovereigns of Belgium and Greece are in fact rulers of "royal democracies" and cannot therefore arrogate to themselves more rights than the English sovereign, nor can they assume prerogatives like the King of Prussia.

Orban, after explaining the differences between absolute, limited and constitutional royalties, refutes the theory of certain writers, especially German, that the Executive may overstep the limits prescribed by the Constitution on the so-called "right of extreme necessity." "No jurist in Belgium," he says, "will ever recognize such a right, because it is contrary to the express provisions of the Constitution." This observation applies naturally also to the Greek Constitution.[37] In short, neither the King of the Belgians nor the King of the Hellenes has the right to direct the foreign affairs of their respective countries, and they are both bound to be guided and advised in all matters of internal administration or foreign policy by their Ministers enjoying the confidence of Parliament.[38]

[35] Giron, *Le Droit Public de la Belgique* (1884), p. 94.

[36] Vautier, *Das Staatsrecht des Königreichs Belgien* (1892), in Marguardsen's *Handbuch des Öffentlichen Rechts*, Vierter Band, Erstes Half-Band, pp. 17, 19.

[37] Orban, *ibid.*, II, pp. 253–254.

[38] It may not be amiss to reproduce here a specimen of the conception of Prussian royalty. Professor Bornhak, comparing the Constitution of Belgium with that of Prussia, says that the former was the product of a revolution. Therefore, he says, by virtue of the principle of national sovereignty the Belgian Constitution delegated the various powers to the Chamber, the King and the courts; whilst, on the other hand, Prussia is the creature of the Dynasty, and [therefore] all rights of state power are united in the person of the sovereign. (Conrad Bornhak, *Preussische Staats und Rechts Geschichte* (1903), p. 466.)

A Greek jurist whom we have already mentioned, commenting upon the present constitutional anomalies in Greece, after tracing the origin of the Hellenic Constitution to the very days of the abortive Greek insurrection which broke out towards the end of the eighteenth century, when the then famous Greek leader and poet, Regas Pheraios, proclaimed the principle of the national sovereignty, tells us that the present Constitution of Greece is founded on the French Constitutional Charter of 1830 and on the Belgian Constitution of 1831, and adds that the committee which, at the time of the drafting of the Constitution of 1864, reported upon Article 44, according to which "the King has no other powers than those conferred expressly on him by the Constitution and the respective special laws," stated in its report that this article completes Art. 21, which declares "that all powers are derived from the nation." [39]

Professor Saripolos, after telling us that the Greek Constitution, like that of France of September 3, 1817, has combined the principle of the sovereignty of the people with the institution of hereditary royalty, states: "If one considers not the law of the Constitution, but the conventions of the Constitution, one finds a kind of dictatorial republic, in which the exercise of all the power is concentrated in the hands of one person." "That person," he adds, "is not the hereditary King, but the Prime Minister." Comparing the Constitution of Greece of 1844 with that of 1864 (which is now in force), the same writer says: "The former was a limited monarchy, while the latter is a limited democracy, not only from the political, but also from the legal standpoint. . . . The nation is the fountain and source of all powers." [39a]

Another learned Greek constitutionalist, after asserting with no less emphasis that the doctrine of the sovereignty of the people was

[39] Philaretos, *ibid.*, pp. 135–137, 141. Philaretos gives us the further information that the late King George I (father of the present King of Greece), for whom he had acted, he says, as legal adviser, in a confidential talk with him expressed freely his views on the progress made in our age for political freedom. "The wisdom of ages," once said the King to Mr. Philaretos, "has definitely and irrevocably condemned the tyrannical and backward monarchism. Progressive humanity has settled in the royal democracy for a more complete political education. No one could now seriously contest that in the far future it will tend more generally towards democracy." (Philaretos, *ibid.*, p. 150, note 80.)

[39a] Saripolos, *ibid.*, pp. 13–15, 19–20.

accepted in Greece during the War for Independence, it being repeatedly indorsed by the various national assemblies of the Revolution, states that "the Constitution of 1864 proclaims the people as the source of all authority in the state in imitation of the similar provision of the Belgian Constitution." [39b] The principle that in Greece the government shall be conducted by the political party which enjoys the confidence of the Legislature was indorsed by the late King George I, the father of Constantine, in a speech from the throne in 1875 when, addressing the representatives of the nation, he said that "The indispensable qualification for a party leader to form a government is to enjoy the explicit confidence of the majority of the members of the Boulé," and that he would always recognize the privileges of the representatives of the nation which are founded both on the letter and the spirit of the constitution; further, that the King believed that "the moral and material progress of the country depended upon the sincere application of parliamentary government." [39c]

The most distinguished constitutionalist of modern Greece, who is praised by Calvo for his treatise on international law (see Calvo, *Le Droit International*, Vol. I, p. 113), namely, the late N. J. Saripolos, father of the author of the same name, and who was the guiding spirit, so to speak, of the Constituent Assembly of 1862–1864, in reporting to the Assembly the findings of the committee of which he was the chairman, said: "In Greece there prevails the incontestable principle that the sovereignty belongs to the national entity only, and that all authority and power is derived from it." [39d] Later, in his learned treatise on the Constitution of Greece, commenting upon this point, he wrote, "Our Constitution is nothing but a pyramid which has democracy as its base, and at the top of it a political chief called a King." [39e] Similarly, another professor of constitutional law who was a member of the same Committee, D. Kyriacou, in his remarks to the National Assembly on this point said, amongst other things, that, as the doc-

[39b] J. Aravantinos, *Hellenikon Sintagmatikon Dikaion* (*i.e.*, Greek Constitutional law), Vol. I, pp. 177–78; see also, observations on same point, p. 203, note 10.

[39c] Aravantinos, *ibid*, p. 178, note 155; also Saripolos, *ibid.*, p. 82.

[39d] Quoted by Aravantinos, *ibid.*, p. 203; note 10.

[39e] N. J Saripolos, *Pragmateia Sintagmatikou Dikaiou*, Vol. I, pp. 111 and 173; quoted by Aravantinos, *ibid*, p. 217, note 8.

trine of the divine right never prevailed in Greece — the nation having always regulated its affairs by Constituent Assemblies — the formulation of the principle of the national sovereignty was a matter of course.[39f]

After the fall of the Venizelos Cabinet in March, 1915, King Constantine, in defiance of public opinion, assumed quasi-dictatorial powers and, in fact, became his own Minister for Foreign Affairs, and the Cretan statesman more than once took him to task publicly. Speaking in the Boulé, on October 11, 1915, Mr. Venizelos said:

> The evolution which our affairs have taken in the last seven months, proves that we are outside the basis of our liberal parliamentary government; because, if the right of internal administration of the country is still recognized in the national sovereignty, as far as our foreign affairs and the shaping of the national policy are concerned, we are confronted with a disregard not only of the vote of the national representation, but also of the verdict of the Hellenic people given by the elections.[40]

Speaking again on November 3, 1915, and commenting upon the interruption of a member of the Boulé who said "Then the King wishes the ruin of the Greek people," Mr. Venizelos replied: "You used a phrase which is unparliamentary in the highest degree. The King in a parliamentary government has no policy." Resuming his speech he continued:

> If these men believe what they say; if they really claim that there can be in a parliamentary government a royal policy, except of a temporary nature for the purpose of appealing to the electorate in order that there may be a change in the government; if they believe there can be a positive and responsible royal policy, they show that they are unworthy of being representatives of the Hellenic people. . . . To govern the people in that way is not a regime of Constitutional royalty, or of a royal democracy under which we have lived for half a century, but a monarchical government in which the destinies of the country are intrusted to one man. . . . The Greek nation knows that the only form of government under which it can live and progress is a constitutional royalty, a royal democracy. If you tell me that your opinion is indorsed by an irresponsible ruler, I tell you that you commit a constitutional impropriety." [41]

[39f] Quoted by Aravantinos, *ibid.* p. 203, note 10.

[40] Debates of Boulé in supplement of newspaper *Patris*, p. 47.

[41] *Ibid.*, sup. *Patris*, pp. 71, 72 and 73.

The ex-Greek Premier repeatedly criticized the King for violating the Constitution. Speaking in Salonica on October 16, 1916, he said:

> The people in Greece consider their King as the first magistrate of the state and that his functions do not consist in imposing his personal will, but in remaining night and day the faithful guardian of the national will, which should be carried out loyally and not falsified. Our Constitution both by its historical origin and by the very letter of its provisions, leaves no doubt as to the sovereignty of the people.[42]

We have now reached the last point of the Greek controversy, namely, the question as to whether the King has the absolute right of dissolving the Greek legislature without any restraint whatever either from his Ministers or from the people at large.

Examining the question broadly, we may inquire whether a constitutional sovereign has the unlimited right of dissolving a body of national representatives, either because the prerogative of dissolution is conferred on the Crown by tradition or long usage, as is the case in England, or is bestowed upon the King by a special provision of the Constitution, as it is with all other constitutional countries. As this royal prerogative is also of English origin, British parliamentary history and the views of English statesmen and writers will furnish us a clue to the solution of the question.

Any student of English constitutional history knows that it took centuries for the people of England to embody into their unwritten Constitution the principle that, although in theory the Crown has the right to dissolve Parliament whenever it pleases so to do, still, in practice, it should only resort to that measure on the advice of the ministers, and further, that after one dissolution the sovereign or his cabinet should abide by the verdict of the country, given at the elections, independently of the personal views of the sovereign or his ministers.

Hearn, speaking of the harmony between the Legislature and the Executive, says:

> In England this result is but of yesterday. It has been attained only after centuries of misunderstandings, of quarrelings and of bloodshed. One King lost his life, another his throne, a third was more than once on the point of abdication. . . . Even after three generations . . .

[42] *Le Temps*, October 16, 1916.

the unyielding adherence of George the Third to his resolutions convulsed England to the center; dismembered the Empire.[43]

The day has fortunately passed when a King like Charles I (1629–1640) could declare that:

> he should account it presumption for any to prescribe a time to him for Parliament, the calling, continuing or dissolving of which was always in his own power; and he should be more inclinable to meet Parliament again, when his people should see more clearly into his intents and actions, when such as have bred the interruption shall have received their condign punishment.[44]

Todd tells us in what instances parliament may be dissolved, which apply generally to every other constitutional country: First, in order to take the sense of the country in regard to the dismissal of ministers by the sovereign; secondly, on account of the existence of disputes between the two Houses of Parliament, which have rendered it impossible for them to work together in harmony; thirdly, for the purpose of ascertaining the sentiments of the constituent body in relation to some important act of the executive government, or some question of public policy upon which the Ministers of the Crown and the House of Commons are at issue; fourthly, whenever there is reason to believe that the House of Commons does not correctly represent the opinions and wishes of the nation.[45]

These views are indorsed by various English constitutionalists, who all agree that after the dissolution of Parliament, for any reason whatever, and the decision of the electorate upon the question at issue, both Crown and Cabinet are bound to abide by the verdict of the country. "If the House of Commons disapproves the policy of the Cabinet," says Freeman, "they have the choice to resign or to appeal to the country by a dissolution of Parliament; but if the new Parliament also declares against them, then it is their duty to resign." [46] Hearn, also referring to this point, says:

> It is that if the constituent body support the representative body, if the House of Commons remain of the same opinion as its predecessors,

[43] Hearn, *ibid.*, p. 114.
[44] Hallam, The Constitutional History of England (1897), Vol. I, pp. 411, 412.
[45] A. Todd, Parliamentary Government in England, Vol. II (1869), p. 405 *et seq.*
[46] Freeman, *ibid.*, p. 116 and p. 210, note 2.

that opinion shall prevail. . . . The Ministry must abide by the results of general election. . . . When the King is unwilling to accept the advice of Parliament . . . he can, if he sees fit, seek for advice in a new House of Commons, and he ought to follow the advice which the House tenders.[47]

Courtney says that "in the election of a new House of Commons the sense of the country is taken; and its authority is accepted as indisputable in connection with the issue or issues presented at the election;" and that "the authority abides until some occasion arises when it is seriously questioned whether the view of the majority of the House remains in accord with the national will." [48] According to Sir William Anson "for a dissolution of Parliament effected by the Sovereign *proprio motu* without the advice or against the advice of his Ministers, we must go back to the days before responsible Government." [49] By ministers is no doubt meant those enjoying the confidence of Parliament and not mere nominees of the Crown. Professor Dicey, commenting at length upon the subject of the dissolution of Parliament, says that "a dissolution is in its essence an appeal from the legal to the political Sovereign," and is "allowable, or necessary, whenever the wishes of the Legislature are, or may fairly be presumed to be, different from the wishes of the nation," that "the chief object of a dissolution is to ascertain that the will of Parliament coincides with the will of the nation," and that "the rules as to the dissolution of Parliament are, like other conventions of the Constitution, intended to secure the ultimate supremacy of the electorate as the true political sovereign of the State." In conclusion, he says "the right of dissolution is the right of appeal to the people, and thus underlies all these constitutional conventions which, in one way or another, are intended

[47] Hearn, *ibid.*, pp. 151, 154 and 156; see also May, *ibid.*, p. 91, and for examples of dissolutions of Parliament, pp. 88 and 91.

[48] Courtney, *ibid.*, pp. 13, 14; see also the judicious observations on this point of W. Bagehot, The English Constitution (1877), pp. 295 *et seq.*

The Liberal Party at one time contested the right of a Cabinet formed from a minority in the House of Commons to obtain from the Crown a dissolution of the Parliament. For debates on this point in the House of Commons and speeches of Gladstone and Disraeli, see Hansard, third series (1867–8), cxci, pp. 1687–1702–1712.

[49] Anson, *ibid.*, Vol. I, p. 304.

to produce harmony between the legal and the political sovereign power." [50]

Continental European cosntitutionalists indorse, in a general way, the views of English writers on this question. Esmein says that although this prerogative, in appearance, seems to be contradictory to parliamentary government, still as a dissolution is immediately followed by new elections, the final decision is in the hands of the voters.[51] Professor Duguit, after acknowledging that the right of dissolution is borrowed from England, says that "by a series of changes the right of dissolution became one of the essential machineries of the parliamentary regime. One can say," he adds, "that it has ceased to be a royal prerogative and has become a ministerial right — the counterpart of ministerial responsibility to Parliament." [52] Another French writer in an admirable treatise on the dissolution of Parliaments, after referring to the right of Chiefs of State to dissolve their legislature, says:

> In the hands of an absolute monarch, who struggles with the national assembly of representatives, the right of dissolution would become a weapon of combat. . . . This right in the hands of a prince who spontaneously grants a representative government, . . . and who does not find the representatives as easy tools of his will, will be availed of in order to secure a more pliant legislature. Such is the case in Germany, where the frequent dissolutions of the Reichstag have no other object but to secure a majority subservient to the plans of the Chancellor. If the right of dissolution had no other object, the progress of parliamentary government would have a tendency to cease. To use this prerogative as an instrument of combat against Parliament, would give to it perhaps the application which it originally had, but it would be a violation of the first law of parliamentary government, namely, the respect due to national representation.

He adds further that "to propose a dissolution without any question of principle being involved, without having any serious reasons to presume that the country will give a sufficient majority to the government, is a proceeding unanimously condemned by public men." [53]

[50] Dicey, *ibid.*, pp. 428–434; see also John W. Burgess, Political Science and Comparative Constitutional Law, 1902, Vol. II, p. 214.

[51] A. Esmein, *Éléments du droit Constitutionnel* (1906), p. 351, note 2.

[52] L. Duguit, *Traité de droit Constitutionnel* (1911), Vol. II, p. 424; see also Barthélemy, *ibid.*, pp. 81–82.

[53] P. Matter, *La Dissolution des Assemblées Parlementaires* (1898), pp. 10, 11, 193.

This French jurist indorses the views of the English constitutionalists that after the elections the executive is bound to abide by the verdict of the people given by their votes. He very wisely observes that a chief of state who made a frequent use of this right would "show a strange contempt for the legislative power and would profoundly shake the confidence which he ought to inspire to the country. The people would be irritated and there would be, between the government and the nation, one of those conflicts which do not find their solution but in a revolution. History," he adds, "furnishes many examples. Charles X (of France) died in exile for having disregarded the rights of the national representation." [54]

A distinguished member of the French Academy, writing during the time of Napoleon III, says that the right of dissolution may be dangerous in the hands of a president of a republic on account of his party affiliations, but not in those of a constitutional monarch, because "such a sovereign, being placed above parties . . . his only interest and duty is to observe with vigilance the game of politics, in order to prevent a great disorder." He pictures an ideal king who studies constantly public opinion and sees if it is in harmony with the views of the representatives of the nation, and intervenes at the proper time by using the right of dissolution. "This Superintendent-General of the state," he adds, "should remain the arbitrator of parties and not belong to any of them. He should not show his preference for any cabinet, for any person, and, if possible, for any opinion." Such a sovereign, according to the French academician, should accept with pleasure every cabinet enjoying the confidence of the nation, and abandon it as soon as it should lose such confidence. "In short," he says, "a constitutional king should never lose sight of the nation, which is the final judge of majorities and cabinets." Commenting upon whether a sovereign should dissolve Parliament more than once, he says that if such dissolution was effected through the initiative of a cabinet because it lost the confidence of the representatives of the nation, or by the sovereign, in order to find out the national will on some question, such step should be taken but once against the same cabinet during the term of such legislature. In other words, if the

[54] Matter, *ibid.*, pp. 274, 275.

elections go against the ministers in power at whose request the legislature was dissolved, they should resign and not have the right to ask for another dissolution. Similarly, if the dissolution was due to the spontaneous act of the king, although the cabinet was supported by the majority of the members of the legislature, the sovereign should not resort to another dissolution because the elections proved favorable to the cabinet.[55]

Such precisely has been the contention of Mr. Venizelos, who, after the dissolution of the Boulé in the course of the year 1915, in which he already had a majority, carried the elections of June, 1915, with a sufficient majority and came again into power. King Constantine, however, again dissolved the Boulé in November, 1915, although no new issue had arisen since the last elections; on the contrary, the issue was the same, namely, the participation by Greece in the European War on the side of the Entente Allies and the carrying out of the obligation of the treaty of alliance with Serbia.

The same views exist and the same practice prevails in regard to the dissolution of Parliament in every country endowed with a constitutional regime. Thus, an Italian constitutionalist, after referring to the right of the King of Italy, according to the letter of the Constitution, to dissolve the Chamber of Deputies, asserts that the English parliamentary system prevails also in that country, and although, he says, the adoption of that system is at variance with the letter of the Italian Constitution, it is nevertheless in harmony with the "conception of liberty and the function of the Crown in a free State."[56] According to a Belgian author, "the Belgian chambers may be dissolved by the King when they have ceased to reflect the opinion of the country or when the division of parties impedes the formation of a steady majority in the Chambers."[57] Another Belgian writer says that the dissolution of the Chambers is far from being an attack on

[55] Prevost-Paradol, *La France Nouvelle* (1868), pp. 144, 145–149.

Matter is, however, of opinion that the newly elected legislature may again be dissolved if a new question arises different from the one at issue during the elections. Matter, *ibid.*, p. 27.

[56] L. Palma, *Corso di Diritto Costituzionale*, Vol. II, p. 529; also *Nuova Antologia*, 2d ser., Vol. XII, 1878, pp. 623 *et seq.*

[57] A. Giron, *ibid.*, p. 111.

the rights of the people. It is on the contrary a formal recognition of the national sovereignty. It is an appeal to find out the opinion of the people.[58]

According to Article 27 of the Constitution of Greece, the King "has the right to dissolve the Boulé," but "the decree of dissolution should be countersigned by the Ministry." It is upon this provision of the Constitution that King Constantine founds all his theory of the so-called royal prerogative of dissolving the legislature whenever he pleases to resort to such a measure irrespective of the result of the elections. He evidently forgets that the principles of parliamentary government and the customs prevailing in other constitutional countries apply also to Greece. Besides, these usages have received their application in that country during the long reign of George I, the father of the present sovereign; and no such question was ever raised from the time of the adoption of the Constitution in 1864 up to the death of the late King, namely in 1913.

Philaretos, commenting upon the action of King Constantine in repeatedly dissolving the Greek Legislature, says:

If the dissolution of the Boulé after the [first] forced resignation of Mr. Venizelos, was ordered by King Constantine because the Crown thought that the people disagreed with the policy of the then government, the verdict of the country given at the elections of June, 1915, dispelled any doubt as to the opinion of the people. If the Sovereign had the right, each time there was a disagreement of opinion (between the Crown and the Ministry) to dissolve the Boulé in an unlimited manner, he could, whenever he pleased, change the royal democracy into a monarchy and could thus base his rights on the text of the Constitution itself.[59]

It is this pretension of the King that was challenged by Mr. Venizelos and his party. Speaking in the Boulé on November 3, 1915, after admitting that the Crown may dissolve Parliament if it believes that the government is not in harmony with the public, Mr. Venizelos said:

The elections which took place in June, 1915, settled that point and the King should have abided by the verdict of the country, and not have

[58] J. J. Thonissen, *ibid.*, p. 227.

The King of Norway is the only constitutional sovereign who does not have the right to dissolve Parliament. J. Morgenstiere, *Das Staatsrecht des Königreichs Norwegen* (1911), pp. 59, 69, quoted by Jellinek in *Allgemeine Staatslehre* (1914), p. 683, note 2; also by Matter, *ibid.*, p. 236.

[59] Philaretos, *ibid.*, pp. 148–149.

ordered, without any reason whatever, a new dissolution and new elections. If you [addressing some members of the Boulé, who supported the King,] believe that according to the meaning of our liberal Constitution the Crown has the right, after an appeal to, and the verdict of, the people, not to follow the will thereby expressed [by the nation], but contend that he [the King] may resort to a new dissolution for the so-called purpose of seeking a new verdict of the people, and subsequently again another verdict, you must admit that the liberal constitutional regime of Greece, under which we have lived for half a century, has become worse than a rag.[60]

In a manifesto to the Greek people in December, 1915, Mr. Venizelos, referring again to this question, said:

After fifty years of free constitutional life, when the people of Greece had succeeded by a supreme effort to accomplish a part of their national programme, the Constitution is transformed into a real scrap of paper. . . . We see the inauguration in Greece, by means of successive dissolutions, of a system of government which can only have a meaning in a monarchical country where the supreme organ of the state is the monarch.[61]

Subsequently Mr. Venizelos, through his mouthpiece, the newspaper *Keryx*, commenting upon the statement by the King to a newspaper correspondent that he "can dissolve Parliament and dismiss his ministers whenever he wished so to do," said:

This is the Prussian theory according to which the King does what he judges is best for the country. In Greece, it is the sovereign people who are the judges, because, according to the Constitution, the authority is exercised not by him (the King) but by the responsible ministers. In Greece the Constitution is the result of a revolution against arbitrary power (that of King Otho), and it expressly safeguards the national sovereignty. The people are in Greece the sovereign of the political power. By the elections it (the Constitution) does not suggest, but imposes upon the Crown the selection of the responsible ministers. Only when there is a justifiable reason to believe that the government represented by the Boulé has ceased to be in harmony with public opinion, can that body be dissolved. But the Crown should abide by the verdict of the elections. In Greece it is the people that are the sovereign and not the King.[62]

Discussing the same question again on May 8 (21), 1916, Mr. Venizelos quotes King George I (the father of Constantine) when he

[60] Supplement to *Patris, ibid.*, pp. 72, 73.
[61] *Times*, December 7, 1915.
[62] *Keryx*, of Athens, May 7 (old style), 1916.

was advised in 1904 to dissolve the Boulé, as saying, "I am a constitutional King. I am not the leader of a party, nor will I ask to be one in order to struggle with parties."

"To sum up," wrote Mr. Venizelos on May 29, 1916, "King Constantine, by seeking to impose his own political programme and showing his indifference to the popular vote, tramples underfoot the Constitution and arrogates to himself an authority which does not belong to him, transforming himself into a guardian of the people, while he is only the first organ of the state." [63]

History furnishes many examples of constitutional kings who, dazzled by the halo that attaches generally to Royalty, or misconstruing the prerogatives attached to the Crown, have encroached upon the liberties of the people, and from constitutional sovereigns became overnight fullfledged autocrats. Now what remedy can the people have against such a person who, in the eye of the law, unlike any other mortal, is irresponsible?

Mr. Gladstone, after observing the absence of a law in England for calling the sovereign to account except in the case of his submitting to the jurisdiction of the Pope, says: "Regal right since the revolution of 1688, being expressly founded upon contract, the breach of that contract destroys the title to the allegiance of the subject" and, assuming such a breach possible, "the Constitution would regard the default of the Monarch, with his heirs, as the chaos of the State, and would simply trust to the inherent energies of the several orders of society for its legal reconstruction." [64] The historian of modern Greece (Finlay) is astonished that "modern statesmen should persist in repeating the philosophic and feudal nonsense (royal irresponsibility) which they are in the habit of inserting in the Constitutions they frame." "It would be difficult," he says, "to see what is precisely meant by royal irresponsibility in a Constitution which proclaims the sovereignty of the people. . . . The fiction of royal irresponsibility or divine right and the phrase 'the King can do no wrong' are incitements to the destruction of Constitutions by what are called *Coups d'État.*" [65] Even

[63] *Keryx*, May 29 (old style), 1916.
[64] Gladstone, Gleanings of Past Years, Vol. I, pp. 227–228.
[65] History of Greece (1877), Vol. VII, p. 326.

such an admirer of constitutional royalty as Prevost-Paradol, after drawing an ideal picture of a constitutional sovereign, remarks:

> Human nature is subject to such errors and is capable of such blind pride, that it is difficult to find a man who would accept without *arrière pensée* this great rôle and resist the mean temptation of becoming the chief of one of the [political] parties. To become a kind of permanent, irremovable Prime Minister and to contest with Cabinets and Parliaments the reins of power, is (who would believe it) the sad ambition of certain Constitutional Kings, who, according to the words of the poet, aspire to descend. The difficulty of finding a good Constitutional King is not less than the difficulty of doing without one.[66]

King Constantine's usurpation of power, with all the evil consequences that have resulted from it, are too obvious to deserve a lengthy comment. The King is a soldier both by inclination and education. His arbitrary temperament more than once alarmed even his late father (George I) and was the cause of his expulsion from the army. Now, using the influence which he acquired over the army during the successful Balkan campaigns, he has determined, according to all accounts, with the connivance and aid of powerful monarchs who share his views, to transform the "royal democracy" into a real "autocracy."

Had King Constantine adhered to the principles of the Constitution, which he promised under oath to uphold, instead of trying to obscure its meaning by legal quibbles; had he honestly used his prerogative within the spirit of the Constitution, both in the internal administration and in the conduct of foreign affairs, by limiting himself to advices and warnings, as becomes a constitutional sovereign, and left to his ministers, who enjoyed the confidence of the nation, the direction of the policy of the country; had he, in short, allowed ministerial responsibility to come between him and public affairs, his ministers would have been for him, as Mr. Gladstone says, "like armor between the flesh and spear that would seek to pierce it," and "dignity and visible authority" would have been "wholly with the wearer of the Crown, but

[66] Prevost-Paradol, *ibid.*, pp. 150, 151. "It is said," wrote Freeman, "that the heathen Swedes when their public affairs went wrong . . . offered their King in sacrifice to God." (*Ibid.*, pp. 28, 29.) This idea may possibly appeal to some of the European nations after the present war in order to prevent national calamities attributed to their kings.

labor mainly, and responsibility wholly, with its servants." [67] This illustrious English statesman (whose statue still adorns the entrance of the National University at Athens) in speaking of the influence of a constitutional king in public affairs, says:

> It is a moral, not a coercive, influence. It operates through the will and reason of the Ministers, not over or against them. It would be an evil and a perilous day for the Monarchy were any prospective possessor of the Crown to assume or claim for himself final, or preponderating, or even independent power, in any one department of the State. Such action for the Sovereign would mean undefended, unprotected action; the armor of irresponsibility would not cover the whole body against sword or spear; a head would project beyond the awning and would invite a sunstroke.[68]

Mr. Venizelos has said that "if the Crown continues to be covered by his irresponsible advisers, who are not supported by the popular verdict, this cover will unfortunately become like a spider's web and be carried away by the first blow of a contrary wind, leaving the Crown unprotected, so that it may directly give an account of its actions. But the rendering of an account of its actions by the Crown would upset the principal virtue of the royal regime, namely, the stability of irresponsible authority, and would shake that very regime." [69]

King Constantine was born and brought up in Greece; he studied the writings of the ancient Greek sages, in the very city which was the cradle of liberty and democracy in ancient times, and which, up to recent times, was the asylum of the persecuted Greeks of Turkey; in fact it is to Athens that were constantly turned all the eyes of *Grecia irredenda*, but suddenly the King of the Hellenes attempts, under German inspiration and influence, to subdue any feeling and suppress every sentiment expressed for the liberation of the Hellenic populations still under the Ottoman rule. The western coast of Asia Minor, still peopled, as in ancient times, by the descendants of the Greek colonists, has been heralded by the King's satellites as "a colony" and unworthy of any effort to possess it, simply because it came under the German sphere of influence. The whole policy of King Constantine — assuming that a constitutional sovereign can have a personal policy — is not to thwart

[67] Gladstone, Gleanings of Past Years, Vol. I, pp. 229–230.
[68] Gladstone, *ibid.*, 233. [69] *Keryx* (of Athens), May 1 (old style), 1916.

the plans of his brother-in-law, Emperor William II, at any price nor in any place. Hence the amazing happenings recently in Hellas, namely the surrender at the behest of Germany of fortresses which had cost millions to build, together with an immense amount of artillery and munitions and other war paraphernalia, all intact. Likewise the surrender also of a part of the richest territory of Greece to her bitterest enemy, Bulgaria. And, finally, the transportation of about 8,000 Greek troops as prisoners of war to Germany, a country with which Greece is at peace.

The publication recently by some Greek officers of the secret agreements with Germany shows that the surrender of the fortresses with their munitions was prearranged for the purpose of strengthening the military situation in Macedonia of the Central Powers. Admiral Countouriotis, who is now a member of the provincial government in Salonica, stated recently that this surrender was done without the knowledge of the Greek Cabinet, of which he was a member at that time, but that it was the work of the King himself and carried out with the knowledge only of his Prime Minister and another member of the Cabinet (Mr. Gounaris), who is the principal tool of the Court. It should be noted that this proceeding is also contrary to the express provision of the Constitution (Article 99) according to which no foreign army can remain in Greece, nor can it go through her territory without a law, which means that the assent of the Legislature was absolutely necessary in this case.

In consequence of the system of absolute monarchy inaugurated in Greece by King Constantine no other authority is now left in that ill-fated country,—at least in the part still under his rule,—except that of the King himself, every vestige of other authority has been totally suppressed. All the safeguards provided by the Constitution for the liberty of the press, the expression of public opinion in mass meetings, security of property and personal liberty have been entirely brushed aside.

Certainly neither the warriors of the war of Greek Independence nor subsequent generations ever imagined that Hellas, the cradle of liberty, would, nearly a century after her emancipation from Turkish tyranny, be transformed into an Asiatic or African sultanate. But

King Constantine evidently forgets that Nemesis, who, according to tradition, is of Hellenic origin, cannot indefinitely witness the ruin of a nation to satisfy the personal policy of its monarch. In a recent interview (March 15, 1917) with the correspondent of the Havas News Agency, Mr. Venizelos predicted: "In the impossible event of Germany being victorious, King Constantine will set up an unbridled autocracy, but if Germany, as I am certain, is finally vanquished, King Constantine, who stepped down from a constitutional throne to become a mere party leader, will have to submit to the consequences of the defeat of his policy just as any other party leader when beaten."

THEODORE P. ION.

THE DESTRUCTION OF NEUTRAL PROPERTY ON ENEMY VESSELS

In 1785 Prussia ratified a treaty with the United States providing in its twenty-third article [1] that in case of war between the contracting powers:

> All merchant and trading vessels employed in exchanging the products of different places, and thereby rendering the necessaries, conveniences, and comforts of human life more easy to be obtained, and more general, shall be allowed to pass free and unmolested; and neither of the contracting Powers shall grant or issue any commission to any private armed vessels, empowering them to take or destroy such trading vessels or interrupt such commerce.

Prussia put this principle in force in 1866, in the war with Austria, on a basis of reciprocity,[2] and again in the Franco-Prussian War of 1870, although on the latter occasion the order was withdrawn as a measure of reprisal against France.[3] Germany voted in favor of the proposition for the general immunity of enemy private property at sea introduced by the United States at the Second Hague Conference.[4]

Prussia was also a signatory of the Armed Neutrality of 1800 [5] and of the Declaration of Paris of 1856 [6] which provided among other things for the immunity of enemy goods on neutral ships and of neutral goods on enemy ships. German publicists have always been among

[1] Malloy, Treaties, p. 1484; Moore, Digest of International Law, 7: 461.

[2] Prussian Royal Order, May 19, 1866, *Gesetz-Sammlung für die Königlichen Preussischen Staaten*, 1866, p. 238; Moore, 7: 467.

[3] Ordinance of North German Union, July 18, 1870, *Bundesgesetzblatt*, 1870, p. 485; repealed by German Ordinance, Jan. 19, 1871, *Reichesgesetzblatt*, 1871, p. 8; F. Perels, *Das internationale öffentliche Seerecht der Gegenwart*, 2d ed., Berlin, 1903, p. 200.

[4] *Deuxième conférence internationale de la paix, Actes et documents*, 3: 834; Naval War College publications, 13: 126.

[5] Convention, Prussia and Russia, 1800, Martens, *Recueil des principaux traités*, 7: 188; Moore, 7: 560.

[6] Martens, *Nouveau Recueil Général de Traités*, 15: 791; Moore, 7: 562.

the foremost in advocating the freedom of the seas and the melioration of the situation of innocent private property thereon in time of war.[7]

In view of this record, the recent decisions of the German Supreme Prize Court in the cases of the *Glitra* [8] and the *Indian Prince* [9] appear to be an interesting departure from German traditions.

The *Glitra* was a British vessel, part of whose cargo was Norwegian. She was met by a German submarine on October 20, 1914, and sunk with her cargo. The Norwegian owner of the cargo brought action in the German prize court for compensation for his property, claiming that as it was exempt from capture by Article 3 of the Declaration of Paris, it must be paid for if destroyed. The claim was refused by the prize court and on appeal to the Supreme Prize Court the decision was affirmed. In brief, the court argued that the destruction of enemy vessels was legal. Although the question of the responsibility of the belligerent for neutral property destroyed on an enemy vessel had been discussed at the London Naval Conference, no decision was reached. Article 114 of the German Prize Code, which was believed by the claimants to provide for compensation in such cases, was held to apply only to innocent goods destroyed on *neutral* vessels. The court then concluded:

> Thus obliged to revert to the most general legal principles in connection with the general laws of war, it is absolutely evident that a claim in favor of the neutral does not exist, if the destruction of the prize was justified by the circumstances. (Prize Ordinance, Art. 112.)
>
> . . . . . .
>
> Since seizure is a legal act, there is no legal basis whatever upon which to found an injury to the goods, which the neutrals have, moreover, themselves caused by entrusting their property to an endangered ship. Therefore, since seizure is a legal act of war, there is no legal basis for establishing the injury to the goods, even if they are lost through an act of war directed against the ship, when owing to the circumstances, such an act must necessarily also be directed against the cargo.
>
> . . . . . .

[7] Perels, *op. cit.* p. 200; H. Wehberg, Capture in War on Land and Sea, trans. J. M. Robertson, London, 1911, is throughout an appeal for the abolition of prize right.

[8] The *Glitra*, *Oberprisengericht*, Berlin, July 10, 1915, *Zeitschrift für Völkerrecht*, 9: 399; this JOURNAL, 10: 921.

[9] The *Indian Prince*, *Oberprisengericht*, Berlin, May 15, 1916, this JOURNAL, 10: 930.

In regard particularly to the condition of naval war, however, Article 3 of the Declaration of Paris gives protection neither in general nor specifically to neutral property against the actions of the belligerents due to the necessities of war. The purpose of Article 3 of the Declaration of Paris was to extend protection to neutral property in an enemy ship which under the prize law as it existed prior to the Declaration was subject to capture. What the necessities of war demand must be allowed to take place, whether neutral property is on board the ship or not. If, according to Article 2 of the Declaration of Paris, the neutral flag protects enemy property, this does not mean that, *vice versa*, neutral property protects the enemy ship, and protects it, indeed, not only against destruction, but also in many cases against every exercise of prize law.

The case of the *Indian Prince* was almost parallel. It also was a British vessel captured and destroyed by the German cruiser *Kronprinz Wilhelm*. Nationals of several neutral states, including the United States, owned portions of the cargo, and claims for compensation were made as in the previous case, the Americans putting in special claims on the basis of the treaty of 1828 between Prussia and the United States reviving Articles 12 and 13 of the treaties of 1785 and 1799 respectively.[10] The treaties were held inapplicable [11] and the decision in the case of the *Glitra* was affirmed. Explaining its reasons in greater detail, the court said:

The question here is whether the commander is compelled by international law to refrain from sinking an enemy vessel when he has a legal right to do so, because its destruction would mean the loss of the neutral goods on board, especially if it is impossible for him to bring the vessel in. After repeated examination the court must con-

[10] Malloy, pp. 1499, 1481, 1491.

[11] Article 12 of the treaty of 1785 providing for "free ships free goods" was held to have no application. Art. 13 of the treaty of 1799, which provides for the preemption rather than confiscation of contraband articles, states that "no such articles carried in the vessels *or by* the subjects or citizens of either party, to the enemies of the other, shall be deemed contraband so as to induce confiscation or condemnation and loss of property to individuals." The American owner of the cargo claimed that the alternative referred to goods belonging to "subjects or citizens" and on the high seas in enemy vessels. The court pointed out that, in the first place, the English version was a mistranslation of the French which read "à bord des vaisseaux *des* sujets ou citoyens de l'une des parties," and hence would furnish no grounds at all for a claim for goods on enemy vessels. Even taking the English version, the court thought it could only refer to actual carriage by the "subjects or citizens," that is, transportation in vessels owned by them.

tinue to answer this question in the negative. In this respect reference can only be made to the former decision. In particular it is incorrect to say that the former decision was based on the fact that by shipping their goods in an enemy vessel, the shippers took the risk of capture and destruction and therefore could not claim compensation. On the contrary, in taking a general view of the matter, the expression to the effect that neutrals had the free choice whether they would entrust their goods to the enemy ship and run the risk in connection therewith, is only used in order to show that the denial of compensation is correct, not only from a legal point of view, but also cannot be considered as unreasonable.

The principal reason which is decisive of the case in question lies in the actual dependence of the cargo on the fate of the ship, in consequence of which the cargo has to suffer the injury resulting from an act directed against the ship, legally committed according to prize law. It cannot be seen why the principle which is generally acknowledged and placed beyond doubt by the report of the drafting committee upon Article 64 of the Declaration of London should apply only to the capture of a ship and not to its just destruction.

It is not proposed to consider the rule of these cases in reference to its effect on neutral commerce or to its military expediency from the standpoint of one of the belligerents, although the rule which must ultimately prevail will doubtless result from a balancing of these two factors. This discussion will be limited to a consideration of the correctness of the decisions of the Supreme Prize Court on the basis of the law before it.

From this standpoint it is necessary to consider: (1) the law applied by German prize courts; (2) the rule, on this question, in the German Prize Ordinance; (3) the rule of international law.

1. THE LAW APPLIED IN GERMAN PRIZE COURTS

It has been a commonplace of Anglo-American jurisprudence since the days of Lord Stowell that prize courts are courts of international law, bound to apply its principles in order to insure the rights of neutrals against undue aggression of the belligerent governments.[12] In con-

[12] Report of British Commissioners on the Silesian Loan Controversy, 1753, British and Foreign State Papers, 20: 889; Moore, 7: 603; the *Flad Oyen*, 1 Rob. 135 (1799); the *Maria*, 1 Rob. 350 (1799); the *Schooner Adeline*, 9 Cranch 244; the *Paquete Habana*, 175 U. S. 677 (1901); the *Marie Glaeser*, L. R. (1914), P. 218. See also Moore, 7: 598.

formity with this view of their functions, specifically established by statute, British prize courts have held that an Order in Council contrary to international law is void.[13]

This conception of prize courts, however, differs widely from that generally held on the Continent. There, the primary function of prize courts is considered to be, not the protection of neutrals, but the protection of the government against acts by its naval forces in violation of their orders and instructions.[14] It thus happens that Continental prize courts do not look primarily to customary international law, but to the laws and ordinances of their own government directing the conduct of naval forces.

This view was clearly expressed by the German prize court in the case of the *Batavier V*:[15]

> A part of the claimants have in the oral proceedings given expression to the view that prize courts have to apply international, not national, law and especially not the contents of the German Prize Ordinance of September 13, 1909, since this does not have the character of a rule of law.
>
> This is not the case.
>
> The prize courts are national courts. They are established by their state to determine whether the legal standards to which the naval organs should adhere according to their instructions are observed or not, and to declare their conclusions thereon. From their purpose it follows that they have to judge according to the law established by their state, whether or not it agrees with the principles of international law. Whether this is the case is not the affair of prize courts to judge, but of the belligerent states, which alone are answerable therefor, to other states. The principle sustained by statements of the older literature, that prize courts have to apply international law even if it does not agree with their national law is then thrown out on fundamental principles. (See Heymann, *Deutsche Juristenzeitung*, 1914, p. 1048; Wehberg, *Seekriegsrecht*, p. 321.) They (prize courts) would

[13] The *Fox*, Edw. Adm. 312 (1811); the *Zamora*, L. R. (1916), 2 A. C. 77, this JOURNAL, 10: 560.

[14] H. Bonfils, *Manuel de Droit International Public*, 6th ed., Paris, 1912, p. 851, and authorities there cited. See also Cushing v. U. S., 22 Ct. Cl. 1, Scott, Cases, p. 929; Commissioner Pinckney, in the *Betsey* (U. S.) *v.* Great Britain, Moore, Int. Arb., 3: 3182; Dana, Notes to Wheaton, p. 480.

[15] The *Batavier V*, *Prisengericht*, Hamburg, June 1, 1915, Dutch Orange Book, October, 1915, p. 106. The opinion in this respect was repeated verbatim in the case of the *Zaanstrom* on the same day, *ibid.*, p. 115.

also be unable practically to carry such principles into operation, for the content of so-called principles of international law is in many cases uncertain and not determined. So far as this is not the case, they might have lost their applicability as a consequence of the relations of the belligerents or through the alteration of their actual provisions. It cannot be expected, for instance, of a belligerent party, whose opponent has broken an international agreement although it was concluded expressly for the event of war, to hold to it and to prescribe a further observance of it to his prize courts. And it needs no proof that certain principles previously valid as customary international law may become obsolete through the development of new forms of naval procedure, such as the submarine.

The argument, finally, that in case the prize court should judge according to national law, an international prize court, such as that provided by the Hague Convention XII of October 18, 1907, would be obliged, as an appellate court, to apply another law than the court of first instance, is shattered by the fact that an international prize court does not at present exist. Precisely, the recognition that the formation of this (considered by Heymann p. 1048, "phantastic") arrangement must have as a prerequisite the unification of the materials of prize law, lead at the end of 1908 to the calling of the London Naval Conference (Wehberg, p. 52) whose work, the Declaration of London, was destroyed by the opposition of England. Each of the participant states, at least in reference to the remaining signatories, would have been obliged to incorporate the law of the Declaration into its national law before an international prize court could have come into operation.

The national law is then to be applied. The German prize law is laid down in the prize Ordinance of September 13, 1909 (*Reichsgesetzblatt*, 1914, pp. 275, *et seq.*), covering essentially the contents of the Declaration of London. It is not true that this is exclusively an instruction for the naval commanders. The introduction ("I approve the following prize ordinance *and* decree. . . ."), and especially a part of its contents, which can relate not to the acts of commanders, but only to those of prize courts, as that concerning the guarantee of compensation (Arts. 8, 121, par. 3), and that concerning condemnation (Arts. 17, 41, 42), prove the contrary. With Heymann (p. 1047), and Arndt (*Deutsche Juristenzeitung*, 1914, Vol. 19, p. 1154), the Prize Ordinance is considered primarily a legal ordinance founded on the imperial law concerning prize jurisdiction of May 3, 1884. (*Reichsgesetzblatt*, 1884, p. 49.)

The Supreme Prize Court has affirmed this view in the case of the *Elida*:[16]

[16] The *Elida*, *Oberprisengericht*, Berlin, May 18, 1915, *Zeit. für Völk.* 9: 109, this *Journal*, 10: 916.

The prize regulations contain the principles laid down by the Kaiser as commander-in-chief within his imperial jurisdiction for the practice of prize law pertaining to naval warfare and are, therefore, primarily law not only for the navy but also for the inland authorities, particularly prize courts in so far as they have to pass upon the legality of the action of commanders at sea falling within the prize law.

International law only lays down rights and duties as between different states. The prize courts, when judging of the legality of prize actions, can take general international principles only into account when the prize regulations contain no instructions and, therefore, tacitly refer to the principles of international law. Therefore, the question whether an instruction of the prize regulations agrees with general international law is not for the prize court to decide. If a contradiction in this connection is asserted, the point in controversy is to be settled in another manner.

From these authoritative utterances there seems to be no doubt but that in the cases of the *Glitra* and the *Indian Prince* the German prize courts were, according to German law, under a primary obligation to apply the national laws and ordinances, especially the Prize Ordinance of 1909, and only secondarily general principles of international law.

2. THE RULE OF THE GERMAN PRIZE ORDINANCE

A number of articles of the German Prize Ordinance of Sept. 30, 1909,[17] relate to the treatment and destruction of captured vessels. Article 111 contains a general requirement that all prizes be brought into port for adjudication. Article 112 states:

The commander may make use of an enemy vessel captured under the circumstances set forth in Arts. 10 to 16b as an auxiliary vessel, or if the bringing in of the vessel appears to him to be inappropriate or unsafe, to destroy the same. The same rule applies to a vessel captured under the circumstances set forth in Art. 56, provided it is certain that it can be proved in a prize court that the vessel be guilty of having rendered unneutral service of the graver kind.

Article 113 allows destruction of neutral vessels liable to condemnation, in certain extraordinary circumstances, and Article 114 provides:

Before the commander determines on the destruction of a vessel, he must consider whether the damage thereby done to the enemy

[17] *Reichsgesetzblatt*, 1914, p. 275. A convenient translation has been published by C. H. Huberich and R. King, The Prize Code of the German Empire as in Force July 1, 1915, New York, 1915.

will outweigh the damages payable for the parts of the cargo not subject to condemnation (see Arts. 18, 42, 51, 56, and 80), and which are destroyed at the same time.

Article 115 provides:

> If a neutral vessel is destroyed, and in the view of the prize court the circumstances enumerated in Art. 113b did not exist, the owners of the vessel and cargo, whether the same were liable to condemnation or not, are entitled to compensation for damages sustained. If the circumstances in question existed, but the vessel, or the neutral goods thereon, destroyed are held to be not liable to condemnation, the owners thereof have a similar right to compensation.

There is no question but that according to Article 112 the destruction of the *Glitra* and the *Indian Prince* was legal. The court, however, held that none of these articles required payment of compensation for the neutral property destroyed, specifically maintaining that Article 114 referred only to the destruction of a neutral vessel.

Judged from the intrinsic contents of the article and the evident purpose of the drafter, this decision is believed to be erroneous:

(1) The article does not specifically state that it is limited only to neutral vessels, and coming immediately after two articles relating respectively to enemy and neutral vessels, it might be supposed to embrace both categories. Articles 112, 113, and 115 each use the adjective *enemy* or *neutral* before vessel, as the case may be. As Article 114 alone omits the adjective, there seems to be a very strong implication that it refers to both types of vessel.

(2) The article itself refers to Article 18, in reference to the type of goods for which compensation must be paid. Article 18 lists the classes of goods in *enemy* vessels subject to capture, omitting neutral goods, thus incorporating the principle of Article 3 of the Declaration of Paris.

(3) The intent of the code may be inferred from the attitude of German text writers, which has been almost uniformly to assume the necessity of compensation in such cases,[18] and especially from the official attitude of Germany at the London Naval Conference, which immediately preceded the drafting of the ordinance. On this occasion

[18] Perels, *op. cit.* p. 299.

the draft presented by the German delegation provided in its 26th article:[19]

> In the case provided in paragraph 18, Art. 25 (sale or destruction of prizes in certain cases), one can equally sink or destroy, with the vessel, the merchandise which is not susceptible of confiscation, and which by reason of the circumstances, cannot be transported to the vessel of war. In this case, the proprietor of the goods will have a right to indemnity.

Upon this proposal the German delegation commented:[20]

> In that which concerns the cargo of a vessel which one has the right to destroy, the confiscable merchandise can be freely destroyed with the vessel. The rest of the cargo ought to be transported to the other vessel, if the circumstances permit. In the case where the goods will be sunk with the vessel we propose, differently from the French memorandum, to recognize in the proprietor the right to a sufficient indemnity.

It is true that in the case of the *Glitra* the court made a half-hearted effort to reconcile this attitude with its present decision, saying:

> Quite the predominant point of the debates was the question of the admissibility of the destruction of *neutral* vessels which were liable to seizure. In mitigation of such a case, Germany was in favor of allowing the neutrals a right of indemnity for goods not liable to seizure.

However, the statement of the proposition, and especially the comment on it, leaves no doubt but that it intended to give compensation for neutral goods destroyed on enemy vessels as well as on neutral vessels.

Finally, the court itself seems to have had qualms of conscience at its interpretation of Article 114, and sought to prove it inapplicable on other grounds. It said further:

> Above all, it is of paramount importance that Article 114 be not *sedes materia*, and therefore, even supposing that the compiler of the regulations was of the opinion that in the case of the legal destruction of a hostile ship claims for compensation could be sustained for neutral goods, it would be incorrect to regard his opinion as a definitive decision of this at least doubtful, and at any rate disputed, but still open question.

[19] British Parliamentary Papers, 1909, Misc. No. 5, p. 99; Nav. War. Col. pub. 11: 13.

[20] British Parl. Pap., 1909, Misc. No. 5, p. 171; Nav. War. Col. pub. 11: 79.

The court then attempts to show that the prize regulations are not positive law in all respects. "Thus Article 114 is indeed only a command to the commanders of men-of-war. The commander-in-chief, but not the legislator, speaks. He does not desire to make substantive law and he does not do so." This statement is impossible to reconcile with the decisions above quoted in the *Batavier V* and the *Elida*,[21] in which it was emphatically laid down that the Prize Ordinance was law not only for naval officers but also for inland authorities, especially prize courts. In fact, one of the reasons given in the former decision for this view was that some of the provisions, especially those relating to guarantees of compensation, could only be applied by courts. If Article 114, referring to indemnity payable for innocent goods destroyed, is not, by this opinion, law for prize courts, it is hard to see what provisions would be.

3. THE RULE OF INTERNATIONAL LAW

Admitting, however, the court's contention that Article 114 was inapplicable, the question must be decided by international law. The resort to international law to fill in *lacunae* in the prize ordinances is the usual practice of German prize courts,[22] and it was indeed specifically mentioned in the case of the *Glitra:*

> Thus obliged to revert to the most general legal principles in connection with the general laws of war, it is absolutely evident that a claim in favor of the neutral does not exist, if the destruction of the prize was justified by the circumstances.

The international law on the question has received little discussion and is exceedingly vague. The cases usually cited and relied on by the German court were those of the *Ludwig* and the *Vorwärts* [23] handed down in 1872 by the French *Commission Provisoire*, which was temporarily acting for the *Conseil d'État* as the highest appellate prize court in France. These two German vessels had been captured by the French cruiser *Desaix* and sunk because the captor was unable to furnish a prize crew, since she had already depleted her crew by furnishing prize

[21] *Supra*, pp. 362–364.

[22] Huberich and King, *op. cit.* pp. xii, xvi.

[23] The opinions in these two cases are identical. *Arrêt du Conseil d'État*, 1872, pp. 777–778; Dalloz, Rept. Gen., 1872, 3: 94.

crews for other vessels captured, and also had forty-one prisoners on board who required the constant surveillance of her crew of thirty men. A British company which had lost property on the destruction of the vessels claimed compensation. This was refused by the prize court of Bordeaux, and the decision was affirmed on appeal:

> Considering that by the terms of the Declaration of Paris of April 16, 1856, approved by the decree of the 28th of the same month, neutral merchandise is not seizable on board an enemy vessel, from which it follows that the neutral who has shipped his goods on this vessel has a right to restitution of his goods or, in case of sale, of payment of the proceeds, but that one can not deduce from this Declaration that he can claim an indemnity by reason of injuries which have been caused him, either through the capture of the vessel when that capture has been recognized as valid, or through acts of war which have accompanied or followed the capture.
>
> Considering that it results from the instructions that the seizure of the *Ludwig* (and *Vorwärts*) has been judged valid and that the destruction of the vessel with its cargo took place on the order of the commander of the warship because, on account of the great number of prisoners on board, the security of his vessel did not permit of detailing a part of the crew to conduct the prize into a port of France.
>
> That in these circumstances the destruction of the prize constituted an act of war of which the proprietors of the cargo can not be permitted to deny the legitimacy, and which can not give a right of indemnity to their profit.

So far as this decision stands for the rule that compensation need not be paid to neutrals for losses resulting from legal acts of war, it has been quite generally accepted by publicists, as for instance, De Boeck,[24] Dupuis,[25] Calvo,[26] Bordwell,[27] Atlay,[28] Atherley-Jones,[29] Hall,[30]

[24] Charles DeBoeck, *De la Propriété Privée Ennemie sous Pavillon Ennemi*, Paris, 1882, sec. 146, p. 146.

[25] C. Dupuis, *Le Droit de la Guerre Maritime d'après les Doctrines Anglaises Contemporaines*, Paris, 1899, p. 340.

[26] C. Calvo, *Le Droit International théorique et pratique*, 5th ed., Paris, 1896, sec. 3033, 5: 279.

[27] Percy Bordwell, The Law of War between Belligerents, Chicago, 1908, p. 226.

[28] J. B. Atlay, note to Wheaton, 4th English ed., London, 1904, p. 507.

[29] L. A. Atherley-Jones and Hugh H. L. Bellot, Commerce in War, London, 1907, p. 717.

[30] W. E. Hall, International Law, 4th ed., p. 744.

and Oppenheim.[31] Wehberg,[32] however, makes the statement, although not directly in connection with this case, that "We must hold to the contention that war is not directed against individuals, and that where a necessity of war, even though wrongly alleged, dictates the capture, compensation must ensue." The German prize court in the case of the *Glitra* admitted that a number of German publicists had maintained the absolute obligation of compensation, and it should be said that the French Naval Instructions of 1870, by which the commander of the *Desaix* was bound, provided for the compensation of neutrals who lost property on destroyed enemy prizes.[33] The French court in its decision ignored this provision in the same manner as the German court appears to have done with the similar provision in the German Prize Ordinance.

But although none but German publicists have objected to the decision in the *Ludwig* and *Vorwärts* because of its failure to compensate the neutral sufferer (admitting the act legitimate), many publicists have held that there was not actually a military necessity to permit of the destruction of these vessels. The German Government was so strongly of this opinion that shortly after the event on January 9, 1871, it issued a circular dispatch stating:[34]

> In naval war the French have set themselves above international law; the French warship *Desaix* has destroyed by burning and sinking on the high seas three German merchant vessels which it had seized, the *Ludwig*, *Vorwärts* and *Charlotte*, instead of bringing them into a French port and leaving them to the judgment of a prize court. The German vessels have therefore been permitted to take reprisals against the French.

[31] L. Oppenheim, International Law, 2d ed., London, 1912, 2: 244.

[32] Wehberg, *op. cit.* p. 189. Perels, *op. cit.* p. 299, also insists on the necessity of compensation.

[33] The *Instruction Complimentaire* to instructions of July 28, 1870, art. 20 (Freeman Snow, Cases on International Law, p. 572) provided: "If compelling circumstances force a cruiser to destroy a prize, because its preservation compromises its own safety or the success of its operations, it is necessary to take care to preserve all the papers on board and other elements necessary to permit the judgment of the prize and the establishment of the indemnity to be awarded to neutrals whose property, non-confiscable, may have been destroyed. One ought to use this right of destruction only with the greatest caution." DeBoeck, *op. cit.* p. 146, notices the failure of the court to apply this instruction.

[34] *Reichsgesetzblatt*, 1871, p. 8; Perels, *op. cit.* p. 200. See also Moore, 7: 468.

The form of these reprisals was the repeal of the ordinance of July 18, 1870, which had provided for the immunity of enemy private property at sea.[35]

Perels[36] is strongly of the opinion that there was not sufficient grounds for destruction in these cases, and Hall agrees with him, although expressing himself with more moderation. He says, after quoting the case:[37]

> It is to be regretted that no limits were set in this decision to the right of destroying neutral property embarked in an enemy's ship. That such property should be exposed to the consequences of necessary acts of war is only in accordance with principle, but to push the rights of a belligerent further is not easily justifiable, and might under some circumstances amount to an indirect repudiation of the Declaration of Paris.

DeBoeck,[38] Depuis,[39] Calvo,[40] and Bordwell,[41] although limiting the right of destruction to extreme cases, think that the circumstances confronting the commander of the *Desaix* were sufficient. The results of this decision and the comments upon it thus appear to establish that compensation need not be paid if the act is really one of military necessity.

In the London Naval Conference of 1909 discussion was held on the question:[42]

> Ought the principle that neutral merchandise found on board an enemy vessel is not seizable, to be interpreted in the sense that in case of the destruction of the vessel the proprietor of the merchandise ought to be indemnified? Or that, since the destruction of the vessel constitutes an act of war, it does not give rise in law to a pecuniary responsibility chargeable to the belligerent.

[35] Perels, *op. cit.* p. 200, after stating the actual reason for the repeal of the order, notes than many publicists have wrongly attributed the withdrawal of general immunity to the failure of France to provide for reciprocity. See Twiss, *Des droits des belligérants sur mer depuis la Déclaration de Paris*, *Rev. de Droit Int.*, 16: 113.

[36] In his first edition (1882), after describing the cases in which destruction is legal, Perels says that the *Desaix* destroyed the German vessels "ohne eine dieser Voraussetzungen." In his 2d edition (1903) he relegates the matter to a footnote and modified the statement to "ohne hinreichende gründe."

[37] Hall, *op. cit.* p. 744.

[38] DeBoeck, *op. cit.* sec. 146, p. 146.

[39] Depuis, *op. cit.* p. 340.

[40] Calvo, *op. cit.* sec. 3033, 5: 279.

[41] Bordwell, *op. cit.* p. 226.

[42] British Parl. Pap., 1909, Misc. No. 5, p. 102, Nav. War. Col. pub. 11: 77.

France [43] presented a proposition in conformity with her stand in the cases of the *Ludwig* and *Vorwärts*. Great Britain,[44] Germany [45] and Japan,[46] on the other hand, proposed that compensation be allowed for all innocent neutral property destroyed on prizes, whether enemy or neutral, but no agreement was reached. It is true that Article 53 of the Declaration provides that, "If neutral goods which were not liable to condemnation have been destroyed with the vessel, the owner of such goods is entitled to compensation." This however, although it might be interpreted as establishing a general principle, is included in an article relating to the destruction of neutral prizes, and hence has no direct application to the case in hand. In the case of the *Indian Prince*, however, the German court relied specifically on a statement in the report of the Drafting Committee on Article 64. This article provides that:

> If the capture of a vessel or of goods is not upheld by the prize court, or if, without being brought to judgment, the captured vessel is released, those interested have the right to compensation, unless there were sufficient reason for capturing the vessel or goods.

In commenting on it the Drafting Committee said: [47]

> Innocent goods on board a vessel which has been captured suffer all the inconveniences of the capture of the vessel. If there were sufficient reasons for capturing the vessel, whether the capture is or is not held to be valid, the owners of the cargo have no right to compensation.

The statement made by the court was as follows:

> The principal reason which is decisive of the case in question, lies in the actual dependence of the cargo on the fate of the ship, in consequence of which the cargo has to suffer the injury resulting from an act directed against the ship legally committed according to prize law. It cannot be seen why the principle which is generally acknowledged and placed beyond doubt by the report of the Drafting Committee

[43] British Parl. Pap., 1909, Misc. No. 5, p. 30.

[44] British Parl. Pap., 1909, Misc. No. 5, p. 38, Misc. No. 4, p. 9. See also instructions to British delegates, Misc. No. 4, p. 28, Nav. War. Col. pub. 11: 69, 75.

[45] British Parl. Pap., 1909, Misc. No. 5, pp. 99, 171; Nav. War. Col. pub. 11: 73, 79.

[46] British Parl. Pap. 1909, Misc. No. 5, p. 276; Nav. War. Col. pub. 11: 80.

[47] Nav. War. Col. pub. 9: 153.

upon Article 64 of the Declaration of London, should apply only to the capture of a ship and not to its just destruction.

Without deciding at this point upon the merits of the general contention, it is submitted that Article 64 and the report thereon has no application to this case. In the first place, the article contains a grant of compensation in certain cases, and it seems to be a process of doubtful legitimacy to imply from this a denial of compensation in all other cases. Furthermore, the statement is carefully limited to "capture," which seems to differ radically from "destruction." As the remainder of the report shows, this article applies only to losses resulting from a decline of favorable markets, deterioration of goods, or other event caused by the delay of the vessel, in which case compensation for such incidental losses is not required if there was "probable cause" for seizure. The goods themselves must, of course, be restored,[48] or if, because of their perishable nature, they have been sold, the proceeds of the sale must be restored.[49] In short, the article relates only to incidental losses, not to the loss of the goods themselves. That the latter case was regarded as in an entirely different category is shown by Articles 51, 52, and 53, which require complete compensation for all innocent property destroyed on neutral vessels, and even for guilty property if there was not sufficient justification for destruction. It would seem that since the analogy is closer, there would be more warrant for applying Article 53 as a general principle applicable to this case, than Article 64, although with a strict interpretation neither of them are exactly in point.

The discussions over the case of the *Ludwig* and *Vorwärts* and the proposals presented to the London Naval Conference indicate that there are two fundamental questions involved, that of the right to destroy enemy prizes, and that of the right of neutrals to compensation for injuries received incidentally to the conduct of war. These may be conveniently discussed separately.

[48] Dec. of London, Arts. 21, 43. See also Hague Convention, VI. 1907, Arts. 2, 3.

[49] Moore, 7: 619.

4. DESTRUCTION OF ENEMY PRIZES

May enemy prizes be destroyed immediately (provided provision is made for the safety of the persons on board), or is there a duty to bring them into port for adjudication, which only yields to military necessity?

The first view was that taken by Russia during the Russo-Japanese War in reference not only to enemy but also to neutral prizes,[50] and supported by the Russian delegation in the Hague Conference of 1907[51] and in the London Naval Conference.[52] This view asserts that, if the capture is legal, title vests immediately in the capturing state; hence it is entirely within its discretion whether it will bring the prize in or destroy it. This view is clearly untenable with reference to neutral prizes, since the discussions arising from the Russo-Japanese War cases and the London Naval Conference,[53] but is still held by some countries, notably Germany, in reference to enemy prizes. The German Prize Code[54] permits the destruction of an enemy vessel if its bringing in would be "inappropriate or unsafe," and German practice has been to destroy enemy vessels at sea during the present war. Wehberg, in his *Capture in War on Land and Sea*, published in 1909, advocates the abolition of all prize right but thinks that while it is retained, "all the corollaries must be deduced from it," among which are the almost unlimited right to destroy prizes.[55] The way in which this right would be used is foreseen with startling clearness.[56]

In any case, primarily the most valuable vessels, which are often the pride of whole communities — one has only to think of the splendid four-screw turbine steamer *Lusitania* of the Cunard line — are thereby exposed to the whole barbarity of the law of prize.

[50] Moore, 7: 519; Nav. War Col. pub. 11: 54.

[51] *Deuxième conférence internationale de la paix, Actes et documents*, 3: 898; Nav. War Col. pub. 11: 62.

[52] British Parl. Pap., 1909, Misc. No. 5, p. 268; Nav. War Col. pub. 11: 77.

[53] Dec. of London, Arts. 48–54; Nav. War Col. pub. 5: 62; 11: 51; Moore, 7: 516.

[54] German Prize Code, Art. 112, *Supra*, p. 364.

[55] Wehberg, *op. cit.* p. 96. The original edition of this work, entitled *Das Beuterecht im Land- und Seekriege*, was published in Tübingen, 1909. The references are to the English translation.

[56] *Ibid.* p. 59.

The reasons which dictate the championing of the right of destruction by certain countries is also clearly expressed.[57]

Valois (*Germany as a Naval Power*) mentions that in a possible war between Germany and England, the German cruisers would have scarcely any chance of bringing their prizes into safety and they would therefore be forced to destroy them. The German zones of protection lie too far away from a probable theater of maritime warfare. The prizes we took would thus be generally recaptured from us by the English on the way to a German port. On the other hand, England, by a deliberate policy, has for hundreds of years acquired colonies everywhere and can easily carry prizes into one of its numerous ports. For this very obvious reason, England recognizes the destruction of prizes only in one single instance, *i.e.*, where the vessel is incapable of continuing the voyage. In this respect, Russia is in an even more unfavorable position than Germany.

The specific orders given to naval commanders by the United States in the War of 1812 to destroy all prizes,[58] the usual practice of the Confederate privateers during the American Civil War,[59] the Russian practice during the war with Japan,[60] and the present German practice [61] are all examples of action based on this reason.

A resolution limiting the right to destroy either enemy or neutral prizes to five exceptional cases was drafted by Bulmerincq in 1879 and adopted by the *Institut de Droit International* in 1882.[62] This view was espoused by Great Britain, France and Germany at the London Naval Conference of 1909.[63] As has been said, Germany took this view in condemning the destruction of the *Ludwig* and *Vorwärts* by the French cruiser *Desaix* in 1871, and the German publicist Perels says: [64]

The destruction of the prize is authorized only in very exceptional circumstances. It must be thus in reality because of the absolute necessity which one is under to have recourse to the judgment of the

[57] Wehberg, *op. cit.* p. 96.

[58] American State Papers, Naval Affairs, 1: 373–376. Moore, 7: 516.

[59] Scott, Cases, p. 932.

[60] Moore, 7:520; S. Takahashi, International Law Applied to the Russo-Japanese War, New York, 1908, p. 310 *et seq.*

[61] J. W. Garner, Some Questions of International Law in the European War, this JOURNAL, 9: 594, 10:12.

[62] *Annuaire de l'institut de Droit international*, 6: 221; Moore, 7: 526.

[63] British Parl. Pap., 1909, Misc. No. 4, p. 28; Misc. No. 5, pp. 99, 101; Nav. War Col. pub. 11: 69.

[64] Perels, *op. cit.* p. 200.

court of prize to decide on the validity of the capture. [After stating the circumstances justifying destruction, he continues.] Without any of these conditions existing, the French vessel *Desaix* destroyed with fire on the high seas on the 14th of October, 1870, the German vessel *Charlotte*, and on the 21st of October the *Vorwärts* and the *Ludwig*. The circular dispatch of the Foreign Office of the North German Confederation of January 9, 1870, exposed this conduct as contrary to international law.

Other publicists, such as Dupuis,[65] De Boeck,[66] Calvo,[67] Hall,[68] and Bordwell [69] have stated that destruction of enemy vessels is justified only by absolute military necessity. The United States Naval War College advised in 1905 that great caution be exercised in the destruction of enemy prizes because of the possibility that neutral property be involved.[70]

The *Ordonnance de la Marine* promulgated by Louis XIV in 1681 incorporated drastic measures from earlier ordinances of 1400, 1517, 1543, and 1584 to prevent the destruction of prizes by privateers.[71] "It is forbidden on penalty of death to all commanders, soldiers and sailors to sink prize vessels and to deposit the prisoners on islands or distant coasts in order to conceal the prize." This ordinance, which suggests recent correspondence with reference to the safety of passengers on captured merchant vessels, was incorporated in Article 64 of the *Arrêté du 2 Prairial an xi*. Later French Naval Instructions of 1870[72] and 1912 [73] prohibit the destruction of enemy prizes, except in case of necessity, and in the cases of the *Ludwig* and *Vorwärts* the act was justified on that ground.

British and American courts have generally held that title to enemy

[65] Dupuis, *op. cit.*, p. 333, gives one of the fullest discussions of the destruction of enemy prizes.

[66] De Boeck, *op. cit.* sec. 146, p. 146.

[67] Calvo, *op. cit.* sec. 3033, 5: 279.

[68] Hall, *op. cit.* p. 744.

[69] Bordwell, *op. cit.* p. 226.

[70] Nav. War Col. pub. 5: 72, 121; 11: 52.

[71] René Valin, *Nouveau Commentaire sur l'Ordonnance de la Marine du mois d'Août 1681*, 2 vols., La Rochelle, 1766, liv. iii, tit. ix, art. 18. The commentator thinks that this would be interpreted leniently in case of military necessity for destruction. See also Pistoye et Duverdy, *Traité des Prises maritimes*, Paris, 1855, 1: 265, 269; Depuis, *op. cit.* p. 339.

[72] *Instruction Complementaire* to instructions of July 28, 1870, Art. 20, Snow, Cases, p. 572.

[73] Instructions, Dec. 19, 1912, Art. 28; Nav. War Col. pub. 13: 192.

prizes does not vest until judicial condemnation, and, consequently, a primary duty exists to bring the prize in.[74] Naval instructions in Great Britain,[75] the United States [76] and Japan [77] have authorized the destruction of enemy vessels in a limited number of cases, while those of Russia [78] have given a wider discretion to naval commanders.

The German Prize Ordinance permits the destruction of enemy prizes at convenience.[79] The court assumed, however, in the cases of the *Glitra* and the *Indian Prince*, that since it was impossible for submarines to bring prizes in because of their small crews, an adequate military necessity existed. This brings up the question of whether the introduction of a new implement of warfare which can not be used effectively with a complete adherence to international law, offers justification for the alteration of that law. The question also arises whether the geographical disadvantages, from which a country like Germany suffers, justify destruction under conditions which would be unjustifiable in a country of more extended ports like England.

It is submitted that military necessity can only be invoked to justify the destruction of a prize in the presence of exceptional circumstances which were unforeseen and beyond human powers of control. Of this character would be the state of the sea, the unseaworthiness or slowness of the prize, or the depletion of the captor cruiser's crew by unforeseen circumstances. Circumstances which are the rule and known before the belligerent vessel leaves its home port, such as an

[74] "Before the ship or goods can be disposed of by the captor, there must be a regular judicial proceeding, wherein both parties may be heard, and condemnation thereupon as prize, in a court of admiralty, judging by the law of nations and treaties." British Report on the Silesian Loan Controversy, 1753, Moore, 7: 603. Oakes *v.* U. S., 174 U. S. 778, 786 (1899); the *Appam*, this JOURNAL, 10: 826 (1916); U. S. Naval Instructions, 1898, Art. 24 (For. Rel. 1898, p. 781); Stockton, Naval War Code, 1900–1904, Art. 49 (Nav. War Col. pub. 5: 114); Moore, 7: 623. In a few cases, American courts have held that title to enemy prizes passes on firm possession without judicial condemnation. The *Mary Ford*, 3 Dall. 188 (1795); the *Adventure*, 8 Cranch 221 (1814); the *Resolution*, 2 Dall. 1 (1781).

[75] Holland, Manual of Naval Prize Law, 1888, Arts. 303–304; Nav. War Col. pub. 5: 64.

[76] Instructions, 1898, Art. 28; 1900–1904, Arts. 49–50; Nav. War Col. pub. 5: 66.

[77] Instructions, 1894, Art. 22; 1904, Art. 9; Nav. War Col. pub. 5: 65.

[78] Instructions, 1895, Art. 21; 1901, Art. 40; Nav. War Col. pub. 5: 66.

[79] Prize Ordinance, 1909, Art. 112.

absence of colonial ports to which a prize might be sent, or the inherent inability of the type of vessel employed to carry a crew sufficient to furnish prize crews, can not be pleaded as grounds of military necessity. In the former case, the circumstances are exceptional and unpremeditated. In the latter, they are the rule and foreseen. In the former case, the intention is to bring the prize in, but circumstances have prevented. In the latter case, the intention is to destroy all vessels. If destruction nevertheless takes place in the second class of circumstances, it is not a legal act of war which might relieve the belligerent from the obligation to pay indemnity for incidental losses.

In conclusion it may be said that the necessity to bring enemy prizes in for adjudication exists, not only because of the possibility of neutral property being on board, but also because enemy vessels are not universally subject to condemnation.

5. COMPENSATION FOR NEUTRAL PROPERTY DESTROYED

Whether or not neutrals are entitled to compensation for goods destroyed on enemy vessels depends somewhat upon the circumstances of destruction. If destruction has been an act of war dictated by exceptional military necessity, then neutrals incidentally injured suffer as they would if they owned property in a city bombarded according to the law of war. On the other hand, if destruction is a normal incident of the capture of enemy merchant vessels, hedged about by no requirements of extraordinary military necessity, it seems clear that a failure to offer compensation would involve a direct violation of the 3d article of the Declaration of Paris.

A neutral may suffer without claim for compensation because of the *necessities* of a belligerent. It is very different to permit him to lose innocent property merely at the *convenience* of the belligerent. These conclusions are believed to be justified by the authorities cited in the discussion of the cases of the *Ludwig* and *Vorwärts*, and by the discussion at the London Naval Conference of 1909.

By combining the two points of view on the two questions respectively of destruction and indemnity, four possible solutions of the question result.

(1) The principle most lenient to the neutral would be that which forbids destruction of enemy vessels except in case of extraordinary necessity, and even then grants compensation for neutral property. This was supported by Great Britain and Germany in the London Naval Conference, and is in harmony with the principles incorporated in the Declaration of London in reference to neutral vessels. Admitting that all prizes ought to be adjudicated in prize court and that innocent neutral property on board even enemy vessels is inviolable, it seems to be the logical result. It probably goes farther, however, than belligerents with geographical disadvantages are likely to permit.

(2) Somewhat less advantageous to the neutral would be the principle which, while admitting the destruction of enemy vessels at convenience, requires compensation to be paid for innocent neutral property on all occasions. This rule is believed to have been intended by the drafter of the German Prize Code of 1909 and is advocated by some German publicists, such as Wehberg. It would seem to be the only solution which can reconcile the exercise of prize rights by belligerents lacking in port facilities, with the 3d article of the Declaration of Paris, unless neutral ports be opened to the sequestration of belligerent prizes, which is entirely out of harmony with the present tendency. This principle, however, would present great practical difficulties in administration, because, by the hypothesis, all evidence of the actual neutral property on board would probably be destroyed, and hence an inviting field for the prosecution of fraudulent claims by neutrals would be opened.

(3) The rule which refuses compensation for neutral property destroyed, but forbids the destruction of the enemy vessel except in case of extraordinary necessity, is in accord with the preponderance of international practice and opinion. It is supported by the cases of the *Ludwig* and *Vorwärts*, although in those cases there might arise a doubt whether sufficient necessity to justify destruction actually existed and also by most of the text writers. As Hall has said, however, the cases of military necessity would have to be sharply defined and limited or there would be danger of violating the Declaration of Paris.

(4) The harshest principle is that which not only permits of the destruction of enemy vessels at convenience, but also refuses compensa-

tion to the neutral owner of property on board. It is believed that this principle can find no justification in international law and is in fact in conflict with Article 3 of the Declaration of Paris, which embodies a principle as old as the *Consolato del Mare.*[80] No authority for the rule, aside from the recent German decisions in the cases of the *Glitra* and the *Indian Prince,* is known.

QUINCY WRIGHT.

[80] In the case of the *Glitra,* the court remarked that prior to the Declaration of Paris, neutral goods in enemy vessels were subject to capture and that the Declaration was adopted to mitigate this practice. (*Supra* pp. 359–360.) This is believed to be incorrect. The third article of the Declaration of Paris was simply declaratory of a rule of international law dating from the Middle Ages, and the only exceptions which existed were in the case of specific treaties declaring "enemy ships, enemy goods" as an offset to the concession of "free ships, free goods." See *Consolato del Mare,* Chap. 273, H. Wheaton, History of the Law of Nations in Europe and America, New York, 1845, p. 63; Report of British Commissioners on the Silesian Loan, 1753, Moore, 7: 603; T. J. Lawrence, The Principles of International Law, 4th ed., New York, 1910, sec. 242, p. 657.

EDITORIAL COMMENT

THE CESSATION OF DIPLOMATIC RELATIONS WITH GERMANY

Since February 4, 1915, when the Imperial German Admiralty proclaimed a "war zone" around the British Isles and declared its purpose to sink on sight, without warning, and without regard to the fate of the passengers or crew, any enemy merchant vessel found in that area, warning neutrals of the danger they would incur of being sunk without warning in those waters, there has been a serious diplomatic controversy between the United States and the Imperial German Government.

The illegality of this proceeding on the part of the Imperial Government is too clear to require extended discussion. The arbitrary designation and demarcation of such a "war zone" by a belligerent Power are not justified by the laws and conditions of effective blockade; for it cannot be pretended that a blockade is effective through which by far the major part of the vessels passing in and out of the alleged "war zone" are not, in fact, actually captured. But the chief offense to neutrals in this proclamation was not the arbitrary limitation of a prohibited area on the high seas. It was the assumption of a right to sink without warning, or any of the legally prescribed formalities of detention and search, any vessel found within this area. This declaration involved a menace of twofold consequence, for it exposed to destruction (1) the lives of neutral innocent noncombatants, and (2) neutral vessels with their passengers and crews. These restrictions upon the freedom of the sea were, from all points of view, so clearly in conflict with established neutral rights as to be intolerable. The Government of the United States, therefore, on February 10, 1915, expressed its urgent protest against the German declaration, and issued its now celebrated note regarding "strict accountability," in case of the sinking of an American vessel or the destruction of American lives as a consequence of the orders of the Imperial German Admiralty.

The reason for this disregard of the legal requirements concerning detention and search, and of provision for safety of passengers and crew,

in case of the destruction of a vessel, was the inability of a new instrument of naval warfare to effect its purpose without exposing itself to danger if it were held to comply with existing legal requirements. This instrument was the submarine torpedo boat, the only sea craft which the Imperial German Government was in a position to employ for the purpose of preventing commerce with Great Britain. The question at issue was, in effect, whether the naval exigencies of the Imperial Government were to be permitted to make an end of neutral rights and the established laws of the sea by employing an instrument of destruction that could not comply with them without risk to itself, yet was able by a secret blow to sink a ship and destroy the lives of innocent travelers and noncombatant crews.

The Imperial Government took the ground that the use of the submarine was essential to the accomplishment of its purpose. The Government of the United States held that noncombatant vessels could not be legally sunk without warning, and that provision must be made for the safety of passengers. Thus, from the beginning of the controversy in February, 1915, it has been evident that the Imperial Government must either conform to these requirements of established law or that the friendship between the United States and Germany could not continue. From that time forward, without waiting for the deplorable events that subsequently occurred, the Government of the United States would have been fully justified in presenting the alternative of an immediate abandonment of its policy by the Imperial Government or the cessation of diplomatic relations. The necessity for a choice was bound up in the opposing attitudes of the two governments and an immediate decision might properly have been at once insisted upon.

The patience of the Government of the United States in dealing with the Imperial Government is unexampled. The sinking of the *Lusitania*, on May 7, 1915, involving the loss of 1153 lives, among them 114 American men, women, and children, justified immediate action by the Government of the United States, which would have obtained the united support of the American people. Since that outrage was perpetrated many more American lives had been destroyed, when the sinking of the *Sussex*, on March 24, 1916, brought public indignation in the United States to a point that absolutely necessitated action.[1]

[1] See editorial entitled The Correspondence Regarding the S.S. *Sussex*, in this JOURNAL, Vol. 10, No. 3, July, 1916, pp. 556–560.

On April 18th the Secretary of State said:

> Unless the Imperial Government should now immediately declare and effect an abandonment of its present methods of submarine warfare against passengers and freight-carrying vessels, the Government of the United States can have no choice but to sever diplomatic relations with the German Empire altogether.

The effect of this note was to call forth a *réponse de transaction*, under date of May 4th. Although the German Ambassador at Washington had stoutly declined by instruction of his government to admit that the sinking of the *Lusitania*, a settlement for which was then under discussion, was "illegal," the Imperial Government now practically conceded that the sinking of merchant ships without warning and the destruction of the lives of noncombatants were in violation of international law, and could be defended only on the ground of reprisal against a belligerent; a defense that wholly ignored the rights of neutrals. With evident reluctance, accompanied with the expressions of sentiments of unfriendliness toward the United States because of its exportation of arms and munitions, the Imperial Government did, however, agree thenceforth to conform its conduct to the requirements of international law; but, with a view to inducing the Government of the United States to place restraints upon the conduct of Great Britain, reserved "complete liberty of decision" in case the United States should not succeed in obtaining the desired concessions from that Power. To this the Secretary of State replied, in effect, that the Government of the United States could not entertain the idea of purchasing Germany's compliance with international law by negotiation with another Government.

As was pointed out in this JOURNAL in the concluding comment on the *Sussex* correspondence, the interchange of views during April and May, 1916, did not, therefore, result in a final solution of the controversy. The conduct of the Imperial Government for a time, however, seemed to indicate a triumph of American diplomacy, but the attitude of both Governments remained substantially unchanged.

The negotiations regarding the *Sussex* incident, had, however, resulted in an ultimatum on the subject of submarine warfare. The Government of the United States had firmly and irrevocably expressed its determination to sever diplomatic relations with Germany altogether, in case the practice complained of was not abandoned. The counsels of the Imperial Government, while temporarily leaning toward

the total abandonment of the sinking of merchant vessels without warning and the merciless destruction of noncombatants, as international law demanded, appear, in fact, to have been divided. The sinking of ships by submarines continued, but it was practiced for a time with a certain degree of restraint.

On January 31, 1917, the German Ambassador presented to the Department of State at Washington a memorandum reading as follows:

> From February 1, 1917, all sea traffic will be stopped with every available weapon and without further notice in the following blockaded zones around Great Britain, France, Italy and in the Eastern Mediterranean.
>
> (Then follows the circumscription of the zones.)
>
> Neutral ships navigating these blockade zones do so at their own risk.

Provision is made that "neutral ships which are on their way toward ports of the blockaded zones on February 1, 1917, and have come within the vicinity of these zones, will be spared during a sufficiently long period;" but, if they have not reached these zones, they are warned to return. Then follows an edict which is, without doubt, the most dictatorial attempt to lay down the rule of the sea and the conditions upon which neutral nations may make use of it ever communicated by one government to another:

> Sailing of regular American passenger steamers may continue undisturbed after February 1, 1917, if
>
> (a) the port of destination is Falmouth;
>
> (b) sailing to or coming from that port course is taken via the Scilly Islands and a point 50 degrees north 20 degrees west;
>
> (c) the steamers are marked in the following way which must not be allowed to other vessels in American ports: On ships' hull and superstructure 3 vertical stripes 1 meter wide each to be painted alternately white and red, and the stern the American national flag.
>
> Care should be taken that, during dark, national flag and painted marks are easily recognizable from a distance and that the boats are well lighted throughout.
>
> (d) one steamer a week sails in each direction with arrival at Falmouth on Sunday and departure from Falmouth on Wednesday;
>
> (e) the United States Government guarantees that no contraband (according to German contraband list) is carried by those steamers.

Comment upon these extraordinary decrees is superfluous. They read like regulations for vessels sailing in German territorial waters. They prescribe not only the one port of destination to which American vessels may go, but the route to be followed, the precise dimensions

and colors of the zebra-like stripes with which they must be decorated, and even the days of arrival and departure as well as the number of sailings.

To this memorandum there was only one possible answer. On February 3 the Secretary of State addressed a note to the German Ambassador recalling the correspondence concerning the *Sussex* and concluding in the following language:

> In view of this declaration (that all ships met within the zones will be sunk), which withdraws suddenly and without prior intimation the solemn assurance given in the Imperial Government's note of May 4, 1916, this Government has no alternative consistent with the dignity and honor of the United States but to take the course which it explicitly announced in its note of April 18, 1916, it would take in the event that the Imperial Government did not declare and effect an abandonment of the methods of submarine warfare then employed and to which the Imperial Government now purpose again to resort.
>
> The President has, therefore, directed me to announce to Your Excellency that all diplomatic relations between the United States and the German Empire are severed, and that the American ambassador at Berlin will be immediately withdrawn and in accordance with such announcement to deliver to Your Excellency your passports.

Thus officially terminated a relation of friendship which had long been sincerely cherished, and which the Government of the United States, with unprecedented forbearance, had striven to maintain. Serious as such a step is, it is approved and sustained by the unanimous opinion of loyal American citizens. It had been provoked by an attitude of indifference to the claims of friendship and the rights of humanity that invalidated all professions of amity, and subsequent revelations of the spirit and designs of the Imperial German Government regarding the territorial integrity of the United States confirm the decision that further intercourse with the Imperial German Government was derogatory to the honor and dignity of the United States.

DAVID J. HILL.

LIMITED USE OF FORCE

The Special Session Message of President Adams of May 16, 1797, at the time of strained relations between the United States and France, offers suggestive material for comparison with conditions at present confronting the United States. President Adams said:

> The diplomatic intercourse between the United States and France being at present suspended, the Government has no means of obtaining official information from that country. . . . Hitherto I have thought proper to prevent the sailing of armed vessels except on voyages to the East Indies, where general usage and the danger from pirates appeared to render the permission proper. Yet the restriction has originated solely from a wish to prevent collisions with the powers at war, contravening the act of Congress of June, 1794, and not from any doubt entertained by me of the policy and propriety of permitting our vessels to employ means of defence while engaged in a lawful foreign commerce. It remains for Congress to prescribe such regulations as will enable our seafaring citizens to defend themselves against violations of the law of nations, and at the same time restrain them from committing acts of hostility against the powers at war. In addition to this voluntary provision for defense by individual citizens, it appears to me necessary to equip the frigates, and provide other vessels of inferior force, to take under convoy such merchant vessels as shall remain unarmed. . . .
>
> However we may consider ourselves, the maritime and commercial powers of the world will consider the United States of America as forming a weight in that balance of power in Europe which never can be forgotten or neglected. It would not only be against our interest, but it would be doing wrong to one half of Europe, at least, if we should voluntarily throw ourselves into either scale. It is a natural policy for a nation that studies to be neutral to consult with other nations engaged in the same studies and pursuits.

Attorney General Lee, in August, 1798, maintained that there was with France "not only an actual war" but "a maritime war authorized by both nations." In Congress there was not lacking at that time the opinion that there was a state of war between the United States and France. When Congress enacted various measures for defense, Edward Livingston, later to be Secretary of State and Minister to France, said: "Let no man flatter himself that the vote which has been given is not a declaration of war. Gentlemen know that this is the case."

Later, in 1830, his views had changed, and he saw in these earlier events that: "This was not a case of war, and the stipulations which reconciled the two nations was not a treaty of peace; it was a convention for the putting an end to certain differences."

The Acts passed aimed, like that of May 28, 1798 (1 Stat. L, 561), "more effectually to protect the commerce and coasts of the United States." Here the President is authorized not to declare war, but to use force because depredation had been committed upon American commerce in contravention of the law of nations. This Act authorized in accord with international law the bringing in for action of vessels which "shall have committed, or which shall be found hovering on the coasts of the United States for the purpose of committing dep-

redations on the vessels belonging to citizens thereof; and also to retake any ship or vessel of any citizen or citizens of the United States which may have been captured by any such armed vessel." This was distinctly an act to protect the commerce and coasts of the United States.

The Act of June 25, 1798 (1 Stat. L. 572) provided that an American merchant vessel "may oppose and defend itself against any search, restraint, or seizure which shall be attempted upon such vessel." This Act was aimed against attempts by French vessels upon American vessels.

In the case of the *Nancy* (27 Ct. Cl. R. 99) it was said:

> It has been urged that the Statutes of the United States authorize resistance by our merchantmen to French visitation and search, to which there is the simple answer that no single State can change the law of nations by its municipal regulations.

This opinion was sustained in 1900 in the case of the *Rose* (36 Ct. Cl. R. 291), where it was said:

> If, therefore, at the time of this seizure there was any conflict between the municipal law of the United States, as exemplified in the statute, and the well-recognized principle of international law, the latter must prevail in the determination of the rights of the parties.

The *Rose*, after resistance and capture, had been condemned under French law. Chancellor Kent had said:

> There may be cases in which the master of a neutral ship may be authorized by the natural right of self-preservation to defend himself against extreme violence threatened by a cruiser grossly abusing his commission; but except in extreme cases a merchant vessel has no right to say for itself, and an armed vessel has no right to say for it, that it will not submit to visitation and search or be carried into a proximate court for inquiry.

In the case of the *Rose* it was argued

> That the condition existing between the two governments and peoples was such that all respect of neutral right had ceased, and that force, fraud, and violence prevailed, and in that connection much is said as to the right of self-defence.

The court, however, stated

> The claimants are treading on very dangerous ground when they urge the higher law of self-preservation. Self-defence is founded on the theory that it is the only remedy, and that, being the only remedy, it presupposes the absence of all law protecting the rights of him who asserts the prerogative of self-defence. If the right of self-defence prevailed to the extent of repelling force by force, and was incident

to the crew of the ship captured, then all other law was silent and war prevailed, which condition would be most disastrous to the case of the claimant.

It was decided that the *Rose* was not entitled to take the law into its own hands and use force and that the seizure in 1799 and condemnation by the French authorities was lawful.

The Act of July 9, 1798 (1 Stat. L. 578), authorized the President "to instruct the commanders of the public armed vessels which are, or which shall be employed in the service of the United States, to subdue, seize and take any armed French vessel." The same Act authorized the commissioning of private vessels for a similar purpose.

The Act of July 7, 1798, had declared treaties between the United States and France at an end because "there is yet pursued against the United States, a system of predatory violence, infracting the said treaties, and hostile to the rights of a free and independent nation."

There was no declaration of war, but there were acts which might properly be regarded as just cause for war. These acts were acts of reprisal against a specified state, sometimes called a condition of limited use of force.

The use of force has been authorized at other times by Congress, as in the *Water Witch* affair in 1858, and in the controversy with Venezuela in 1890.

In all cases where force is thus used by state against state it should be borne in mind that, as said by the Court of Claims in 1909, "while reprisals are acts of war in fact, it is for the state affected to determine for itself whether the relation of actual war was intended by them." (The Schooner *Endeavor*, 44 Ct. Cl. 242.)

GEORGE G. WILSON.

SANCTION FOR INTERNATIONAL AGREEMENTS

Whether or not justified, the lack of confidence in international agreements seems in some quarters to have become more general in recent years. Diplomatic agents, and those particularly concerned with international relations, seem, however, to have no illusions. In ancient times, and often in modern times, Deity has been called upon to witness agreements between tribal or political unities. In early Grecian tribal agreements, a money penalty was provided if either party failed in its obligations, and the penalty was to go as a tribute to the Olympian Zeus. Hostages were early given, and many other

attempts to secure observance of agreements through extraneous pledges may be found. A mediæval treaty makes the parties swear to its observance "by the name of God Almighty, by the Invisible Trinity, by all Divine things, and by the last Day of Judgment." While hostages have not been given for more than a century and a half, the call upon Deity has remained common. Even the Treaty of Paris of 1856 contains the well-worn formula "in the name of Almighty God." The treaty of 1848 between the United States and Mexico, which in Article 21 provides for arbitration in case of disagreement with respect to interpretation of the treaty itself "or with respect to any other particular concerning the political or the commercial relations of the two nations," also opens with the formula "in the name of Almighty God."

A distinguished English publicist in 1867, on reviewing the field of treaty agreement, wrote that "these varied and redoubled promises rested on nothing at all but the good faith they were meant to fortify, and that a penalty which is nugatory, or a pledge which can be circumvented, is not only ineffective, but worse, because it lends a treacherous satisfaction to the conscience, suggests the very subtleties that elude it, and assists the easy work of self-deception." Even if this opinion is too pessimistic it certainly was not based on lack of comprehensive knowledge and wide experience. An eminent German jurist has recently said, "Good faith and mutual confidence are the highest sanction of civil law; it is not so in international law." Other students of world affairs have in recent years felt the need of effective sanctions for treaty agreements. Such sanctions are especially needed at a time when it would be more advantageous for one of the parties to disregard rather than to keep its contractual agreement.

Some recent conventions, such as the Hague Convention of 1907, relative to the Opening of Hostility, provide for penalties. The above convention provides that, as to third parties who would become neutral, the existence of a state of war "shall not take effect in regard to them until after the receipt of a notification." The penalty for failure to make the state of war properly known is to this extent automatic. The Convention of 1907 respecting the Laws and Customs of War on Land, unlike the cosresponding convention of 1899, contained a provision that "a belligerent party which violates the provisions of said regulations shall, if the case demands, be liable to pay compensation." Thus there was introduced a penal sanction for violation of the rules.

Discussions such as those of the men experienced in practical poli-

tics, members of the Interparliamentary Union, show a growing feeling that agreements between states, however formally made, are not in themselves sufficient sureties for state conduct. If treaties are to be made under the proviso *rebus sic stantibus*, there is little to assure observance unless in the treaty itself there be some assurance that the question whether conditions remain the same shall be determined equitably and not by the opinion of one party only. There is demanded some international surety that treaties shall not be disregarded at the pleasure of one of the parties without consideration of the rights or supposed rights of the other. Various organizations, such as the League to Enforce Peace, the Central Organization for a Durable Peace, certain of the proposed organizations of neutral states, and other suggested unions, have as a part of their purpose to put a physical or other effective sanction behind international agreements.

There may be just ground for difference of opinion as to the best method by which the observance of treaty agreements may be made more certain. There seems, however, to be little difference of opinion in regard to the question that they should be made more secure. Certain persons claim that many existing treaties are worse than useless and that their provisions should therefore be disregarded. Doubtless there are many such treaties, but the admission of this fact does not imply that one of the parties may legally act in disregard of its treaty obligation. Certainly some method should be found to make it at least inexpedient for a state deliberately to break a treaty contract which it has assumed and upon the fulfilment of which the other parties are relying. It does not require searching investigation of the speeches and writings of those entrusted with the direction of state affairs, to find evidence that simple treaty obligations are not always by them held as prohibiting action in opposition to the treaty if such action would be decidedly for the supposed advantage or interests of the state which they serve.

It is also true that all states do not take the same attitude toward obligations embodied in treaty stipulations. Some states regard such obligations as strictly binding until the treaty is denounced; others have regarded treaties as convenient statements of present policy while some rulers have even gone so far as to declare they were not bound by acts of their predecessors.

The foreign offices of all the leading European states have, since 1914, made clear their desire for an effective sanction for international

agreements, and have further indicated that this sanction is not to be found in mere words. This has in a realistic way been demonstrated by Switzerland, which, in its own official statement is "situated on an island amidst the seething waves of the terrible world war," and is compelled "to maintain and defend, by all the means at its disposal its neutrality and the inviolability of its territory as recognized by the Treaties of 1815." If a treaty between two states is only as strong as the forces of the states, the value of the treaty in an extreme trial is questionable. It now seems to be the time, according to the pronouncements of both belligerent parties, to devise sanctions of whatever kind they may be, which shall be neither illusory nor impracticable.

GEORGE G. WILSON.

PROJECTS SUBMITTED TO THE AMERICAN INSTITUTE OF INTERNATIONAL LAW

Of special interest to the readers of the JOURNAL is the *Rapport Questionnaire et Projets* which has been prepared for the American Institute of International Law by the distinguished Secretary-General of the Institute, Alejandro Alvarez. The *Report* is the result of five years of study and the synthesis of several prior publications, viz., *The Codification of International Law*, Paris, 1912; *The Great European War and the Neutrality of Chile*, Paris, 1915; and *The Future of International Law*, Washington, 1916.

The central task which the Institute has set for itself is the noble and all-important one of assisting in the creation of an organization which shall assure for the society of states a permanent peace. This work was inaugurated in December, 1915, when the Institute, upon the motion of its President, Hon. James Brown Scott, adopted a "Declaration of the Rights and Duties of Nations" intended to serve as a basis for the reconstitution of international law. There are those who contend that such a "Declaration" is mere verbiage or abstraction. This criticism might be justified if the Declaration were regarded as consisting of absolute, inherent, eternal, primordial Laws of Nature; but we can hardly conceive of any rational objection to a statement of fundamental principles which may serve as a basis or guide for structural organization and international regulation.

The coming session of the Institute will apparently be devoted to a study and discussion of the various plans which have been submitted

by the various American societies of international law, for the future organization of the world on a pacific basis, "in such wise, that when the Great War shall have ended, the different governments will have at their disposition a work as complete as a possible, which will clearly express the wishes of all America in respect to the future international organization" (p. 3 of the *Report*).[1]

Admitting the complexity of the problem, Señor Alvarez finds that the main obstacle to a durable peace is a nationalism which is too narrow and exclusive. Consequently, in the international organization of the future, it will be necessary:

(1) To extirpate this narrow and exclusive patriotism, or at least to attenuate or complete it by encouraging a sentiment more in harmony with the interdependence of states;

(2) To eliminate, or at least to reduce, the causes of rivalry between states;

(3) To subordinate all relations between states to juridical rules in such a manner as to exclude "policy" as much as possible;

(4) and (5) To provide bases upon which must rest the international law of the future and international law upon the American continent.

As means of modifying chauvanism or excess of national sentiment, Señor Alvarez suggests education, limitation of armaments, the establishment of national institutions, better international organization, etc.

The causes of rivalry between states may be divided into two great categories — moral or psychological and economic. Among the former may be mentioned the primordial factor of a too narrow nationalism, race hatred, desire for revenge, the longing for liberty or independence, etc. "The causes of rivalries of an economic order are derived from an increase of population, the development of commerce and industry, leading to imperialistic policies characterized by a desire to acquire colonies, to extend trade to certain zones or to dominate there (rivalries for markets), the wish to have an easy access to certain regions, etc." (p. 12).

As solutions for these problems are suggested:

(*a*) Centralization and development of international administrative services or unions into one Administrative Union.

[1] The report was submitted to the meeting of the Institute held in Havana in January last. The Institute expressed neither approval nor disapproval of the project, but referred it for an expression of opinion to the national societies of international law for examination and report. The Institute decided that the project would not be considered until after the war. — J. B. S.

(*b*) The formation of an Economic and Commercial Union.

(*c*) The creation of an international legislative organ or Legislative Union which shall organize and centralize the various international conferences which meet constantly. For example, a permanent committee to prepare programs, secure ratifications, etc., might be instituted.

(*d*) The creation of an international judicial organ or Permanent Court of International Justice to apply the law to particular cases as also to interpret and develop the rules of international law if these are obscure or incomplete.

(*e*) If possible, the creation of an executive organ, whether in the form of an Executive Council or Committee of International Conciliation. This Council or Committee should attempt to insure international order without having recourse to arms, force being used, if at all, only in case of extreme necessity. For the sanction of the new world order the principal reliance is placed upon moral suasion or a public opinion which should be the main guarantee of international order. It seems that the American Institute of International Law is opposed to the League to Enforce Peace idea as championed by Ex-President Taft and many other eminent Americans.

It appears that the American Institute is looking forward to a new conception of international law which shall bear the following characteristics:

(*a*) The law of warfare which will consist mainly of the rights and obligations of neutrality, should be relegated to a secondary role. In any case, the rights of neutrals must no longer be subordinated to those of belligerents.

(*b*) The new international law must emphasize the conceptions of duty, solidarity, and the general interest.

(*c*) International law must rest upon the fundamental rights of states.

(*d*) Not all international regulations are of universal application. There are rules which are only applicable to particular nations, or to a particular region or Continent.

(*e*) The domain of international law should be extended not merely to the relations of states between themselves, but to such international entities as international associations, as also to other matters of an international character, such as the rights of individuals.

(*f*) International law should constitute a part of the legislation of each state in the sense that it shall be respected by the legislative power and applied by the national tribunals. Consequently, a state

should be responsible in damages for violations of international law, whether resulting from national laws or judicial decision.

Attached to the *Report* are the following schemes which seem to form sections of a projected code of international law: on "The Fundamental Basis of the International Law of the Future," on "The Fundamental Rights of the American Continent," and on "Maritime Neutrality."

Time and space forbid an adequate or detailed criticism of the suggestions contained in the *Report* to the American Institute submitted by Señor Alvarez. We have therefore confined ourselves mainly to the pleasanter task of exposition. However, it may not be out of place to offer a few words of adverse criticism. Some of the ideas we consider extremely suggestive and even fruitful; others seem to be of doubtful value; while a few appear to be either impracticable or undesirable.

Señor Alvarez is probably correct in holding that a too narrow and exclusive nationalism or patriotism is the main cause of modern war. Nationality seems to be the modern religion — the source of so much that is both good and evil. But in attempting to extirpate or attenuate this primordial factor, great care should be taken not to uproot or to injure the good along with the evil.

The causes of war are much deeper and more varied and complex than the author of this *Report* seems to realize. How can we hope to eradicate this gigantic evil by any system of international law or of mere international regulation? How, for example, can we hope ever to extend the domain of law so as to include all matters of public policy; or how can we reasonably expect to provide a system of law which shall control or regulate all matters of international trade or effectively prevent the exploitation of weaker or backward peoples, thus eliminating national commercial rivalries — the prolific cause of so many modern wars? How solve the various Balkan riddles, the Mexican question, the American-Japanese problem; or secure American interests in the Caribbean by any of the formulas contained in this *Report?* It might be well to create an International Administrative Union, an Economic and Commercial Union, a Legislative Union, etc., but how far would they go toward the solution of these and other vital questions of national or international policy?

We might inquire how much attention Powers like Germany, Russia, or even the British Empire and the United States would be likely to pay to a Committee of International Conciliation which relied upon moral suasion or an international public opinion (which does not as yet

exist) to execute its decrees unless these orders were believed to be in harmony with the vital national interests of these great empires.

The elaboration of a particular American International Law we believe to be both Utopian and undesirable. The spiritual and material interests of North America are much more closely bound up with Europe than with South America, and this is likely to be even more the case in the future than in the past. The dream of an even partially isolated America is forever gone, and even if the Monroe Doctrine be extended (which will almost certainly be the case), this need not prevent a much closer interrelation between Europe and America than has hitherto existed.

In unduly emphasizing the rights and obligations of neutrality, we are convinced that Señor Alvarez and his associates are looking backward rather than forward. In a world of ever increasing international solidarity and interdependence, the obligations of non-intervention and neutrality must tend more and more to disappear. In a future world war the role of the neutral must needs be mainly confined to the weaker and smaller states who, by reason of their weakness or lack of vital interest in the conflict, may prefer to hold themselves aloof from the struggle as far as possible. As our former great champion of neutrality, President Wilson, remarked in an address at Cincinnati on October 26, 1916:

> This is the last war of the kind or of any kind that involves the world that the United States can keep out of. I say this because I believe the business of neutrality is over; not because I want it to be over, but I mean this, that war now has such a scale that the position of neutrals sooner or later becomes intolerable.

AMOS S. HERSHEY.

THE ARMED OCCUPATION OF SANTO DOMINGO

The Dominican Republic has been "in a state of military occupation" by the armed forces of the United States since the twenty-ninth of November, 1916. The purpose of this military occupation was stated by Captain Knapp, of the U.S.S. *Olympia*, in his proclamation[1] of that date, as follows:

> This military occupation is undertaken with no immediate or ulterior object of destroying the sovereignty of the Republic of Santo Domingo, but, on the contrary, is designed to give aid to that country in returning to a condition of internal order

[1] Printed in the Supplement to this JOURNAL, p. 94.

that will enable it to observe the terms of the treaty aforesaid (1907), and the obligations resting upon it as one of the family of nations.

The specific basis for this intervention is found in Article III of the treaty of 1907 between Santo Domingo and the United States.[2]

> Until the Dominican Republic has paid the whole amount of the bonds of the debt, its public debt shall not be increased except by previous agreement between the Dominican Government and the United States. A like agreement shall be necessary to modify the import duties, it being an indispensable condition for the modification of such duties that the Dominican Executive demonstrate and that the President of the United States recognize that, on the basis of exportations and importations of the like amount and the like character during the two years preceding that in which it is desired to make such modification, the total net customs receipts would at such altered rates of duties have been for each of such two years in excess of the sum of $2,000,000, United States gold.

The proclamation goes on to say that: "The Government of Santo Domingo has violated said Article III on more than one occasion; and . . . the government of Santo Domingo has from time to time explained such violations by the necessity of incurring expenses incident to the repression of revolution." The exact nature of these violations has not been officially disclosed, but it would not seem open to controversy that, in spite of the hopes of the negotiators of the 1907 Convention, the finances of Santo Domingo had long been badly administered. It has been asserted that eighty percent of the revenues of the Republic had been required for salaries alone. A situation which would admit of seven Presidents since 1911 would certainly appear to be one demanding drastic measures. It had become evident that the treaty of 1907 had not provided adequate safeguards for the rights of foreign creditors, and as a consequence, of the sovereign interests of Santo Domingo, menaced by the claims of these creditors.

The immediate occasion for American intervention was the revolution against President Jimenez in May, 1916. The operations of the rebels became such a menace to American and foreign interests that United States marines were landed on May 16th, and the capital of the Republic was occupied. The presence of British and French warships was an added complication. This was removed by the arrival of Admiral Caperton, who was of higher rank than the commanding officers of these warships. Admiral Caperton and Minister Russell endeavored to obtain free elections for the presidency, and a complete

[2] Printed in the Supplement to this JOURNAL for 1907 (Vol. 1), p. 231.

cessation of fighting. The rebels continued to fight on, and attacked the United States Marine Camp at Monte Cristo on June 6th. This condition of affairs became so intolerable that it finally became necessary to place the Republic under military occupation. Since November 29th of last year the ordinary administration of justice and the laws of the Republic has been carried on through duly authorized Dominican officials, "all under the oversight and control of the United States forces exercising military government."

It may be pertinent to ask what is the precise nature of this military government, and from whence are its powers derived. Captain Knapp declared in his proclamation that: "acting under the authority and direction of the Government of the United States . . . the Republic of Santo Domingo is hereby placed in a state of military occupation by the forces under my command, and is made subject to military government and to the exercise of military law applicable to such occupation." It is evident that this military government could not aim at the subversion of the sovereignty of Santo Domingo. The United States exercises an "oversight and control" and acts only in behalf of Dominican sovereignty. It is merely a trustee for the time being to meet an extraordinary emergency.

From the point of view of American law, or international procedure, however, it is not quite clear what is meant by "military law" or what is the source of the power exercised by this military government. Military law of course strictly denotes the law which governs the conduct of military persons. It does not apply to civilians. Martial law, on the other hand, has come to be regarded from the strictly American point of view as set forth in *Ex Parte* Milligan (4 Wall., p. 2) as applying only in times of special emergency within the territorial jurisdiction of the United States. In that case it was stated: "If, in foreign invasion or civil war, . . . on the theatre of active military operations, where war really prevails, there is a necessity to furnish a substitute for the civil authority, thus overthrown, to preserve the safety of the army and society, and as no power is left but the military, it is allowed to govern by martial rule until the laws can have their free course."

The "military law" applied in Santo Domingo is therefore the law of military occupation. It is not martial law in the strict interpretation of that term. It is the law of military government. This distinction has been clearly brought out by Magoon in his book *The Law of Civil Government under Military Occupation* (p. 12):

It will be seen that a military government takes the place of a suspended or destroyed sovereignty, while martial law or, more properly, martial rule, takes the place of certain governmental agencies which for the time being are unable to cope with existing conditions in a locality which remains subject to the sovereignty.

The next question that arises is: "Does this military government administer the law of war relating to military occupation?" Is it necessary, in other words, to have an actual or an implied state of war in order to warrant the institution of military government? In the case of Santo Domingo there has been no avowed hostile occupation. There have been clashes between individual Santo Dominicans and United States forces, but there has been no recognition of a state of war. Moreover, the American officials have scrupulously endeavored to respect the laws of the Republic. The "military occupation" has been restricted to "oversight and control."

We would seem to be in the presence of a most anomalous situation. It is possible to predicate an implied state of war in Santo Domingo, arising out of forceful opposition to the United States in its efforts to protect American and foreign interests in accordance with the treaty of 1907. The law of military occupation in accordance with the laws of war will then have full sway. It is also possible to predicate an armed intervention for a limited purpose, which expressly disavows any intent to impose the law of military occupation as prescribed by the laws of war. The latter hypothesis is in closer accord with the nature of American intervention in Santo Domingo. The armed occupation of that republic is not hostile. The laws of war do not apply. The purpose of the military government is friendly. The law it applies, therefore, is whatever the President of the United States as commander-in-chief of the army and navy may consider to be required by the emergency. That the President possesses such extraordinary powers would seem to have been fully proven in various decisions of the Supreme Court, notably that of *In re Neagle* (135 U.S., 1). The justification of the extraordinary use of such power as in the case of the armed occupation of Santo Domingo is an entirely different question.

The Department of State has not indicated as yet the future policy of the United States in Santo Domingo. In the meantime the military occupation will doubtless continue until the people of that country show their ability to establish a government able to fulfill its treaty engagements, and to observe "the obligations resting upon it as one of the family of nations," to quote the words of the proclamation.

As to the first condition, it should be apparent that a new treaty between Santo Domingo and the United States will be required to afford adequate guarantees for the protection of foreign creditors, as well as to safeguard the rights of the Dominican Republic. The natural model to follow will be the treaty between Haiti and the United States, of September 16, 1915.[3] This convention provides, in addition to an American receivership of customs, for a financial advisor possessing very extensive powers to be nominated by the United States, and for a native constabulary under American officers. It also guards against the cession of territory by Haiti to any foreign government, or the impairment of its independence. It would seem likely that the United States will be compelled to insist on similar guarantees on the part of Santo Domingo before the armed occupation may safely be terminated.

In regard to the broad question of intervention, most of the writers on international law are agreed in laying down the positive duty of non-intervention by one nation in the affairs of another. It is clear that the claims of nations to independence, equality, and sovereignty preclude any intrusion in each other's domestic affairs. Nevertheless most of these publicists are compelled to concede that there may be justifiable causes for intervention in exceptional cases. This is particularly evident where there is a collective mandate by several Powers, or where a nation reserves by treaty the right of intervention under certain conditions, as in the case of the United States and Cuba. As a matter of fact it would seem clear that if there were no right of intervention, either gross wrongs would be committed by some nations subject to no restraints, or certain countries would relapse into barbarism. Under such conditions, in the absence of an international police, or a special mandate, a nation is bound to intervene in the affairs of another. Intervention, therefore, in the defence of specific rights or the general interests of international society thus becomes legally justifiable. Whether it be characterized as an abatement of an international nuisance, as a measure of self-defence, or as a service to mankind, intervention in many instances may properly be classified as a legal measure of self-redress. It is not merely a matter of policy, as some writers would hold.

The original intervention of the United States in Santo Domingo in 1907 to aid in the restoration of its finances and the defence of its very existence was justified as a logical extension of the Monroe Doctrine. It resulted in the protection of the rights of the foreign creditors and of

[3] See editorial in this JOURNAL for October, 1916 (Vol. 10), p. 859.

the Dominican Republic as well. Apart from the Monroe Doctrine, this intervention was likewise dictated by the necessity of protecting purely American interests. The present armed occupation is justified technically by the duty of enforcing the terms of the convention of 1907. From every point of view, therefore, the action of the United States, in both Haiti and Santo Domingo, would seem to be in accord with its duties as a responsible member of the family of nations, and particularly with its obligations as an elder brother of these less fortunate republics. There is nothing illegal or reprehensible in intervention of this character in the defence of special rights and the general interests of international law and order.

PHILIP MARSHALL BROWN.

MEXICO AND THE UNITED STATES

On October 19, 1915, the United States Government recognized the *de facto* government in Mexico presided over by General Carranza. In a report to the President, rendered on February 12, 1916, upon the ability of that government to fulfill its promises and obligations to protect American rights and property undertaken before recognition was extended, Secretary of State Lansing expressed the opinion that "the lawless conditions which have long continued throughout a large part of the territory of Mexico are not easy to remedy and that a great number of bandits who have infested certain districts and devastated property in such territory cannot be suppressed immediately, but that their suppression will require some time for its accomplishment, pending which it may be expected that they will commit sporadic outrages upon lives and property." [1]

Less than a month after this statement was made, namely, on March 9, 1916, the territory of the United States was invaded by a force under the command of Francisco Villa, which attacked the city of Columbus, New Mexico, killed a number of Americans, and set fire to many buildings. As soon as a sufficient force of American troops could be collected, they pursued Villa's band of raiders across the international boundary line and established themselves at certain points in northern Mexico.[2]

In a public announcement issued on March 25, 1916, President Wilson stated that "the expedition into Mexico was ordered under an agree-

[1] This JOURNAL, April, 1916 (Volume 10), p. 366.
[2] This JOURNAL for April, 1916 (Volume 10), p. 337.

ment with the *de facto* government of Mexico for the single purpose of taking the bandit Villa, whose forces had actually invaded the territory of the United States, and is in no sense intended as an invasion of that republic or as an infringement of its sovereignty." He stated further that

> The expedition is simply a necessary punitive measure, aimed solely at the elimination of the marauders who raided Columbus and who infest an unprotected district near the border which they use as a base in making attacks upon the lives and property of our citizens within our own territory. It is the purpose of our commanders to coöperate in every possible way with the forces of General Carranza in removing this cause of irritation to both governments and to retire from Mexican territory so soon as that object is accomplished.[3]

In support of the President's action the United States Senate had, on March 17, 1916, adopted the following resolutions:

> *Whereas* it is understood that the President has ordered or is about to order the armed forces of the United States to cross the international boundary line between this country and Mexico for the pursuit and punishment of the band of outlaws who committed outrages on American soil at Columbus, New Mexico; and
>
> *Whereas* the President has obtained the consent of the de facto government of Mexico for this punitive expedition; and
>
> *Whereas* the President has given assurance to the de facto government that the use of this armed force shall be for the sole purpose of apprehending and punishing said lawless band, and that the military operations now in contemplation will be scrupulously confined to the object already announced, and that in no circumstance will they be suffered to trench in any degree upon the sovereignty of Mexico or develop into intervention of any kind: Therefore be it
>
> *Resolved by the Senate (the House of Representatives concurring)*, That the use of the armed forces of the United States for the sole purpose of apprehending and punishing the lawless band of armed men who entered the United States from Mexico on the 9th day of March, 1916, committed outrages on American soil, and fled into Mexico, is hereby approved; and that the Congress also extends its assurance to the de facto government of Mexico and to the Mexican people that the pursuit of said lawless band of armed men across the international boundary line into Mexico is for the single purpose of arresting and punishing the fugitive band of outlaws; that the Congress in approving the use of the armed forces of the United States for the purposes announced joins with the President in declaring that such military expedition shall not be permitted to encroach in any degree upon the sovereignty of Mexico or to interfere in any manner with the domestic affairs of the Mexican people.[4]

The entry of American troops into Mexico was not regarded kindly by the Mexicans, and obstacles to the operations of the American forces

[3] Supplement to this JOURNAL for July, 1916 (Volume 10), p. 191.

[4] Congressional Record, March 17, 1916, Volume 53, p. 4274.

were promptly placed in their way. At Parral, where it was believed the American forces were on the point of capturing Villa, they were, while passing through the town, attacked by the inhabitants, and, in order to prevent bloodshed, they withdrew. In the meantime a lengthy correspondence ensued between General Carranza and the State Department regarding the agreement under which the United States asserted its forces had entered Mexico. General Carranza denied the existence of such an agreement and impugned generally the good faith of the United States in its dealings with Mexico. The relations between the two countries became severely strained and reached the breaking point on May 22, 1916, when General Carranza denounced the American punitive expedition "as an invasion without Mexico's consent, without its knowledge, and without the coöperation of its authorities," and demanded its immediate withdrawal under threat of an appeal to arms in case of a refusal to comply.

The United States replied to General Carranza on June 20, 1916, in which it reviewed the altruistic attitude of the American Government toward Mexico during the trying years of its series of revolutions beginning with the overthrow of General Diaz, vigorously defended its action in protecting its border by patrolling a portion of Mexico in which Carranza was obviously unable to exert any semblance of authority, and firmly declined to entertain his request for the withdrawal of the troops until he gave evidence of some ability to fulfill his international obligations to his neighbor on the north.

On the day following the despatch of this note a battle occurred between American and Mexican forces at Carrizal in consequence of orders which had been issued by Carranza to his army not to permit movements of American troops except back towards the border. This occurrence made it evident that, unless either country showed a disposition to yield, war would inevitably occur. The tension was relieved on July 4, 1916, when Carranza suggested mediation by Latin-American Governments. The United States answered on July 7, offering to exchange views with Carranza as to a practicable plan for settlement.

In pursuance of this exchange of notes, a series of conferences took place in Washington beginning July 10. On July 12, 1916, General Carranza's representative at Washington proposed that each government name three commissioners to "decide forthwith the question relating to the evacuation of the American forces now in Mexico and to draw up and conclude a protocol of agreement regarding the recip-

rocal crossing of the frontier by forces of both governments; also to determine the origin of the incursions to date in order to fix the responsibility therefor and definitely to settle the difficulties now pending or those which may arise between the two countries for the same or similar reasons." This proposal was accepted by the Department of State on July 28, 1916, but with the suggestion "that the powers of the commission be enlarged so that . . . the commission may also consider such other matters, the friendly arrangement of which would tend to improve the relations of the two countries." It was stipulated by both parties that the recommendations of the commission should be subject to the approval of their respective governments.[5]

The *de facto* government replied to the American note on August 4, naming the Mexican members of the joint commission, who, General Carranza stated, had been "instructed to devote their attention preferably to the solution of the points mentioned in the previous note" of Mexico.[6] This phrase was subsequently explained by the Mexican representative at Washington as not limiting the commission's discussion to the question of troops and border raids, but that the *de facto* government merely desired that these matters should be given preference, and that other questions might be taken up later by the commission.[7]

The joint commission, composed of Hon. Franklin K. Lane, Judge George Gray, and Mr. John R. Mott, for the United States, and Luis Cabrerra, Ignacio Bonillas and Alberto Pani, for Mexico, met at New London, Connecticut, on September 6, 1916, subsequently removed to Atlantic City, New Jersey, and continued their sessions for several months.

While the details of the deliberations of the commission were not made public, press reports and statements issued by the Commissioners from time to time indicated that the differences of opinion between them were not easy of reconcilement. The Mexican Commissioners seemed to be disinclined to discuss any matters relating to internal affairs in Mexico until the question relating to troops on the border was settled. On the other hand, the American Commissioners felt that the settlement of the border question alone would leave the way open for a recurrence of trouble between the two countries. As stated by Secretary Lane in a statement made public on November 24, 1916, the American Commissioners believed that

[5] New York *Times*, July 29, 1916.
[6] *Ibid.*, August 5, 1916.
[7] *Ibid.*, August 9, 1916.

the border troubles are only symptoms. Mexico needs system treatment, — not symptom treatment. She can give it to herself and we hope she will. . . . We will help her to get into good shape if she can understand that we mean to be her friend. . . . The purpose for which this commission was formed was to exert one last effort toward making Mexico a possible neighbor under the Constitutionalist Government. We do not wish to be forced into intervention or any other course until this opportunity has been exhausted. To this end we must pass from the border matters of irritation, and immediate concern, to the conditions of Mexico which affect the lives and property of our nationals and all other nationals. . . . Then we ask that, with our help or without it, Mexico feed herself and drive out disease. There will be little banditry if Mexico gets to work.

The miseries of Mexico must be assuaged. Her poor, naked, starving, dying peons call out for help. They do not wish constant war, and only one per cent of her people are actually in the war, but all are suffering. We cannot maintain our self-respect or be true to the highest dictates of humanity and see these people suffer as they do because of the chaos that has come from civil war.[8]

On November 24 the Commissioners signed a protocol providing for the withdrawal of American troops. The articles of this protocol were as follows:

ARTICLE 1. The Government of the United States agrees to begin the withdrawal of American troops from Mexican soil as soon as practicable, such withdrawal, subject to the further terms of this agreement, to be completed not later than ; that is to say forty (40) days after the approval of this agreement by both governments.

ARTICLE 2. The American commander shall determine the manner in which the withdrawal shall be effected, so as to insure the safety of the territory affected by the withdrawal.

ARTICLE 3. The territory evacuated by the American troops shall be occupied and adequately protected by the Constitutionalist forces, and such evacuation shall take place when the Constitutionalist forces have taken position to the south of the American forces so as to make effective such occupation and protection. The Mexican commissioners shall determine the plan for the occupation and protection of the territory evacuated by the American forces.

ARTICLE 4. The American and Mexican commanders shall deal separately or wherever practicable, in friendly coöperation with any obstacles which may arise tending to delay the withdrawal. In case there are any further activities of the forces inimical to the Constitutional Government which threaten the safety of the international border along the northern section of Chihuahua, the withdrawal of the American forces shall not be delayed beyond the period strictly necessary to overcome such activities.

ARTICLE 5. The withdrawal of American troops shall be effected by marching through Columbus, or by using the Mexican Northwestern Railroad to El Paso, or by boat routes, as may be deemed most convenient or expedient by the American commander.

[8] New York *Times*, November 25, 1916.

ARTICLE 6. Each of the governments parties to this agreement shall guard its side of the international boundary. This, however, does not preclude such coöperation on the part of the military commanders of both countries as may be practicable.[9]

The protocol was accompanied by a memorandum in which the commissioners agreed that "It shall be understood that if we meet for the discussion of other questions, the American Commissioners will not ask that any final agreement shall be reached as to any such questions while the American troops are in Mexico."

Upon the signature of the above protocol the commission issued the following statement regarding the result of their labors up to that time:

The commission has come to an agreement as to withdrawal of American troops in Mexico and border control, which is to go by Mr. Pani to Mexico. If it is acceptable the conferences will be resumed within two weeks. The troops are to be withdrawn by General Pershing within forty days of approval of the agreement, but in such manner as will permit the Mexican troops to occupy the evacuated territory, which the Mexicans have agreed to do.

Should the northern section of Chihuahua be in a state of turmoil such as to threaten our border the American troops may alone or in conjunction with the Mexican troops disburse the marauders and the time for withdrawal shall be extended by the time necessary for such work. The Mexican commander is to have control of the plan by which occupation of northern Chihuahua is effected, and General Pershing is to have control of the plan of withdrawal and the right to use the railroad to Juarez if he so desires.

The commission found it impracticable to arrange a plan of joint border control through a common military force, and abandoned the idea of a border zone which has been so much discussed. It is, however, left to the commanders of both nations on the border to enter into such arrangements for coöperation against marauders whenever it is practicable.

The agreement distinctly states that each side is to care for its own side of the border, but that this shall not preclude coöperation between the two forces to preserve peace upon the border.

Right to Pursue Raiders

The American Commissioners told their Mexican colleagues that as a matter of national necessity the policy of this government must be to reserve the right to pursue marauders coming from Mexico into the United States so long as conditions in northern Mexico are in their present abnormal condition. Such pursuit is not, however, to be regarded by Mexico as in any way hostile to the Carranza Government, for these marauders are our common enemies.

The correspondence between the two State departments under which the commission was created requires the latter to deal not only with withdrawal of troops, but also with all other questions affecting the two countries, chief of which may be

[9] Text printed in the Washington *Post*, January 3, 1917.

said to be the protection of the lives and property of all foreigners in Mexico. The American Commissioners have not only pressed for the consideration of this matter, but for a number of others, such as the establishment of an international claims commission and the restoration of health conditions in Mexico, where typhus is making headway and death by starvation is common. These questions, as well as many others, have already been considered by the commission informally and are to be given formal consideration when the commission reassembles, which it will as soon as the agreement as to withdrawal and border control, which was officially made of preferential concern, has been approved by both governments.

The present agreement may, therefore, be regarded as the first step only in the work of the commission. If this, however, is not found to be agreeable to the two governments, the commission will, by force of the understanding had between the two State departments, come to an end.[19]

A delay of several months ensued before any definite statement was made concerning General Carranza's attitude toward the protocol. Statements emanating from the Mexican Commissioners during this interval indicated that, while Carranza did not object to the terms of the protocol, he objected to the reservation by the American Commissioners, not included in the protocol, but mentioned in the statement accompanying its signature, of the right of the United States to pursue bandits across the border. It was also intimated that General Carranza felt that his approval of the protocol would place him in a position of having appeared to sanction the presence of foreign troops in Mexico. Several sessions of the commission were held late in December to consider General Carranza's suggestions for a modification of the protocol. The American Commissioners declined to entertain such suggestions, however, and, on January 2, 1917, it was officially stated that Carranza had refused to ratify the protocol. The final meeting of the commission was held on January 15, 1917, when it was agreed that further discussion of international questions was impracticable and the commission adjourned.

Pursuant to recommendations of the American Commissioners, however, the President decided to withdraw the American troops, to hold General Carranza's Government responsible for American interests in the territory affected, and to maintain a patrol along the American border, which would be sent into Mexico if necessary to protect American territory and rights. Accordingly on January 28, 1917, orders were issued by the War Department for the withdrawal of the troops and within a week they had returned to American soil.

[19] New York *Times*, November 25, 1916.

At the same time the President decided to send a diplomatic representative to Mexico to take up through diplomatic channels the questions which the joint commission had been unable to adjust. Mr. Henry P. Fletcher, formerly American Minister to Chile, who had been appointed Ambassador to Mexico on February 25, 1916, and detained in the United States because of the unsatisfactory state of the relations between the two countries, arrived in Mexico on February 17, 1917.

Thus closes the long period of interrupted official intercourse between the United States and Mexico, which started with the refusal of the United States to recognize Huerta after the assassination of Madero, who overthrew Diaz. Many believe that it would have been wiser for the United States to have acted upon the principle that it was not concerned as to the manner in which a Mexican president came into power and promptly to have recognized Huerta. Those who hold this view believe that General Huerta could have pacified the country within a few months and thus saved Mexico many years of bloodshed and the United States much concern and no small expenditure of money. They also assert that the failure to recognize Huerta really amounted to intervention in the internal affairs of the country and that the United States is therefore more or less morally responsible for what took place afterwards.

The purpose of this comment is to continue from previous numbers the narrative of events in Mexico, and space will not permit a consideration of the legal or political aspects of the incidents which have been related in the course of the narrative. It is the belief of the writer, however, that there is no basis for the allegation that the American action with regard to Mexico amounted to intervention. He believes further that the American policy accords with the best American practices and traditions. Whether its application to recent events in Mexico was wise can only be determined by the future course of events in that country.

GEORGE A. FINCH.

HAVANA SESSION OF THE AMERICAN INSTITUTE OF INTERNATIONAL LAW

On January 22, 1917, in Havana, the American Institute of International Law began its second session and ended it on January 27th. It was formally invited by the Cuban Government to hold its session in Cuba, and it was the guest of the Cuban Society of International Law.

On the closing day of the session, the Uruguayan Minister to Cuba invited the Institute to hold its next session in the City of Montevideo as the guest of the Republic of Uruguay. This invitation was accepted and the third session of the Institute will accordingly be held in Montevideo in the course of 1918, as the guest of the Uruguayan Government and under the auspices of the Uruguayan Society of International Law.

Without entering into details of the purpose and organization of the Institute, as this has been done in previous issues of the JOURNAL, suffice it to say that it is composed of five publicists of each of the twenty-one American republics, recommended in the first instance by the national society of international law of each American republic and elected in the first instance by the charter members, and, after its organization, by the members of the Institute. Its purpose was and is to bring an equal number of publicists of the different American countries together, in order that by an exchange of views and by personal and provisional coöperation principles of justice which should control at least the relations of American countries may be discovered, made known and put into practice.

At the first session, held in Washington in connection with and under the auspices of the Second Pan American Scientific Congress, the Institute adopted on January 6, 1917, its Declaration of the Rights and Duties of Nations, based in every instance upon an adjudged case of the Supreme Court of the United States, thus showing by a concrete example that not only a legal but a judicial basis for a law of nations exists in fact as well as in theory. Without giving the text of this Declaration, which has been printed in a previous number of the JOURNAL,[1] or going into further details, particular attention is called to the fact that the Institute's Declaration of the Rights and Duties of Nations is not the product of philosophic speculation, although, if it were, this fact would not deprive it of value; but it is, as previously stated, based in every instance upon solemn judgments of the Supreme Court of the United States, which is not only a prototype of an international court, but is an international court and the only permanent and successful international court which has ever been created. The Institute's Declaration was based upon decisions of this tribunal, in order to show that the fundamental principles of the law of nations are legal, capable of ascertainment, definition, application, and development by a court of justice.

[1] January, 1916, (Vol. 10), p. 124.

The Institute adopted a series of recommendations to be known as the Recommendations of Havana, dealing with international organization. These recommendations are of a more speculative nature, for they could not very well be based upon the decisions of the Supreme Court or indeed of any other court, as they deal with the things of the future, not of the present and of the past. Like the Declaration, they have little or no claim to originality, as they aim to give form and shape to a sequence of proposals, which may be said to be in the air. They were unanimously adopted and will appear in the proceedings of the Institute, accompanied by a commentary, as in the case of the Declaration of the Rights and Duties of Nations.

The Institute considered a series of projects, which, however, it did not adopt, and upon which it refrained from an expression of opinion, as, before taking action, it seemed desirable to refer them to each of the twenty-one national societies of the American republics, in order to obtain an expression of their views in advance. These projects relate to the fundamental bases of international law, the fundamental rights of the American Continent, the regulation of neutrality in naval war, the organization of a court of arbitral justice, a union or league of nations for the maintenance of peace, the rights and duties of nations which are derived from the fundamental rights. The texts of these projects will appear as appendices to the summary statement called the Final Act of the Havana session, and, of as present interest to the readers of the JOURNAL, the text of this Act, containing the Recommendations of Havana and the enumeration of the projects and proposals referred to the national societies, is printed in English translation in the Supplement to this JOURNAL, p. 47.

JAMES BROWN SCOTT.

SOCIETY FOR THE PUBLICATION OF GROTIUS

The JOURNAL takes pleasure in publishing the following announcement:

The other day a "Society for the publication of Grotius" was formed at The Hague, with the object of preparing a new edition of the works of Hugo Grotius (1583–1645), the famous Dutch scholar, renowned alike as lawyer, theologian, philosopher and historian. A commencement will be made by publishing the letters written by and to Grotius. A committee has been appointed, consisting of the following gentlemen: Professor Mr. C. van Vollenhoven, of Leiden, President; Mr. G. J. Fabius, of Rotterdam, Treasurer; Professor Dr. J. Huizinga, of Leiden;

Professor Dr. A. Eekhof, of Leiden; Mr. G. Vissering, of Amsterdam; Dr. D. F. Scheurleer, of The Hague, and Dr. P. C. Molhuysen, of The Hague, Secretary.

It is perhaps too much to say that Grotius was the founder of international law, as he aims, as shown, to construct a system of international law from the works of his predecessors. The fact remains, however, that he performed this great service, and the three books on the law of war and of peace published in 1625 are the first systematic treatises on the law of nations.

It is not a valid criticism that he did not create what he expounded, and he expounded so well what he found at hand, and so much of the treatise is due to the industry, thought and judgment which he brought to the performance of the self-imposed task that he is rightly considered the father, if not the founder, of international law; and, in any event, he is the author of the first systematic treatise on the subject, and through this treatise, and because of its author, jurisprudence found itself endowed with a new branch of law, and the world with a rule of conduct for the nations. In this vast domain the great Dutchman had no master and he still awaits a rival.

But, great as his service to international law is, has been, and will be, which has made him a benefactor of his kind and of nations, he would be sure of grateful remembrance had he never treated the law of nations. By profession a lawyer, and leader of the bar in his own country, he was a theologian, a poet and a scholar in a day when scholarship meant as great, if not greater, familiarity with Latin and Greek and the literature in those languages than with the language and literature of his own country. He was possessed of the learning of his day and generation to a degree remarkable in any man, and which is almost unbelieveable in a man of affairs. In his boyhood Henry IV pronounced him the miracle of Holland, and today he is its glory as well as its miracle.

It is peculiarly appropriate that Dutch scholars should think of Grotius today and announce an edition of his works, for it was in a time of bloodshed and despair that he himself penned his immortal work on the law of nations. "I saw," he said, "in the whole Christian world a license of fighting at which even barbarians might blush, wars begun on trifling pretexts, and carried on without any reverence for Divine or man-made laws, as if that one declaration of war let loose every crime."

Because of this international situation, and because of his belief that

there was a law to be observed in war as well as in peace, he wrote his treatise, which has done more to introduce justice into the conscience of nations than the work of any other man.

May the re-publication of the treatise turn the thoughts and the minds of men to the principles which he advocated, and may the old work in its new form render a new service to the old cause of justice, to justice as between men.

If, unfortunately, the waters of the ocean should sweep over Holland and blot it out forever, it would be immortalized by the work of the man whom the government of that day imprisoned for life when he still honored their country with his presence, and whose dead body was stoned by the people in the streets when it was brought back to Delft for burial. Of a truth "the prophet is not without honor, save in his own country and in his own house."

JAMES BROWN SCOTT.

RESPECT FOR THE AMERICAN FLAG

Among the rights stated by publicists to which nations are entitled is the right to respect, including the right to have their national emblems respected and the respect enforced by penalties if need be. The United States possesses this right as a nation, although adequate steps have not been taken in times past to secure the flag of the United States and the national emblems from desecration. An Act of Congress, approved February 8, 1917, was passed "to prevent and punish the desecration, mutilation, or improper use, within the District of Columbia, of the flag of the United States of America," and the passage of this Act at this time makes brief comment upon the general subject both timely and interesting. This is, however, not the only law on the statute books. In 1905 and in 1907 the question was considered from a different standpoint, and, in allowing trade marks to be registered in the patent office, the flag, national and State emblems were excluded.[1] Two years later this Act was amended by the Act of February 2, 1907, and the clause regarding flags and national emblems was retained without change.[2]

In the American form of government, the United States, speaking of the States as a whole, possesses the powers which have been spe-

[1] U.S. Statutes at Large, 58 Cong., Vol. 33, Pt. 1, Public Laws, p. 725.
[2] U.S. Statutes at Large, 59 Cong., Vol. 34, Pt. 1, Public Laws, p. 1251.

cifically or impliedly delegated, and the powers not specifically or impliedly delegated to the United States and not renounced by the States are by the Tenth Amendment to the Constitution "reserved to the States respectively, or to the people." The question might arise as to whether a State of the American Union could pass an Act to prevent and punish the desecration of the flag of the United States, or whether the United States in Congress assembled should alone be able to exercise this as a power impliedly, though not specifically, delegated, or whether both the United States and the States composing the more perfect union could pass laws on the subject and enforce their observance by appropriate penalties. As many States have passed statutes dealing with this subject,[3] it was to be expected that the question would one day arise, and that the Supreme Court should be called upon to decide it. This happened in the case of Halter *v.* Nebraska (205 U.S., 34), decided in 1906, and the court declared the State Act constitutional, or declared it not to be unconstitutional. As the opinion of the court is not merely instructive and interesting in itself, but peculiarly timely, when the

[3] Laws for the protection of the national flag have been adopted by the states as follows:

Alaska. Sess. Laws, 1913, p. 3
Arizona. Sess. Laws, 1913, p. 3; Penal Code, 1913, Sec. 7023
California. Sess. Laws, 1899, p. 46
Colorado. Rev. Stats. 1909, Sec. 2599
Connecticut. Gen. Stat. 1902, Sec. 1386
Delaware. Sess. Laws, 1903, p. 892
Hawaii. Rev. Stat. 1915, Sec. 4223
Idaho. Penal Code, 1908, Sec. 7215
Illinois. Sess. Laws, 1907, p. 351
Indiana. Sess. Laws, 1901, p. 351
Iowa. Sess. Laws, 1913, p. 315
Kansas. Sess. Laws, 1905, p. 300
Louisiana. Sess. Laws, 1912, p. 41
Maine. Rev. Stat. 1903, Stat. 118, Sec. 5
Maryland. Sess. Laws, 1902, p. 720
Michigan. Pub. Act, 1901, p. 139
Massachusetts. Rev. Stats. 1902, Sec. 206
Minnesota. Gen. Stat. 1913, Sec. 9012
Missouri. Rev. Stat. 1909, Sec. 4884
Montana. Penal Code, 1907, Sec. 8875
Nebraska. Rev. Stats. 1913, Sec. 8852
New Mexico. Revised Laws, 1915, Sec. 1812
Nevada. Rev. Stats. 1912, Sec. 5603
New Hampshire. Sess. Laws, 1899, p. 302; amended, Sess. Laws, Ch. 87, 1915
New Jersey. Sess. Laws, 1904, p. 34
New York Penal Laws, 1909, Ch. 88, Sec. 1425
North Dakota. Penal Code, 1905, Sec. 9427
Oregon. General Laws, 1901, p. 286
Pennsylvania. Sess. Laws, 1907, p. 225
Porto Rico. Rev. Stat. 1911, Sec. 958
Rhode Island. General Laws, 1909, Ch. 349, Sec. 3941
Utah. Penal Code, 1907, Sec. 4487
Vermont. Public Stat. 1906, Sec. 5969
Washington. Criminal Code, 1909, Sec. 423
Wisconsin. Statutes, 1913, Sec. 4575
Wyoming. Rev. Stat., 1910, Sec. 5984.

United States is just entering upon a war, the material portion of Mr. Justice Harlan's opinion is quoted:

From the earliest periods in the history of the human race, banners, standards and ensigns have been adopted as symbols of the power and history of the peoples who bore them. It is not then remarkable that the American people, acting through the legislative branch of the Government, early in their history, prescribed a flag as symbolical of the existence and sovereignty of the Nation. Indeed, it would have been extraordinary if the Government had started this country upon its marvelous career without giving it a flag to be recognized as the emblem of the American Republic. For that flag every true American has not simply an appreciation but a deep affection. No American, nor any foreign born person who enjoys the privileges of American citizenship, ever looks upon it without taking pride in the fact that he lives under this free Government. Hence, it has often occurred that insults to a flag have been the cause of war, and indignities put upon it, in the presence of those who revere it, have often been resented and sometimes punished on the spot.

It may be said that as the flag is an emblem of National sovereignty, it was for Congress alone, by appropriate legislation to prohibit its use for illegitimate purposes. We cannot yield to this view. If Congress has not chosen to legislate on this subject, and if an enactment by it would supersede state laws of like character, it does not follow that in the absence of National legislation the State is without power to act. There are matters which, by legislation, may be brought within the exclusive control of the General Government, but over which, in the absence of National legislation, the State may exert some control in the interest of its own people. For instance, it is well established that in the absence of legislation by Congress a State may, by different methods, improve and protect the navigation of a waterway of the United States wholly within the boundary of such State. So, a State may exert its power to strengthen the bonds of the Union and therefore, to that end, may encourage patriotism and love of country among its people. When, by its legislation, the State encourages a feeling of patriotism towards the Nation, it necessarily encourages a like feeling towards the State. One who loves the Union will love the State in which he resides and love both of the common country and of the State will diminish in proportion as respect for the flag is weakened. Therefore a State will be wanting in care for the well-being of its people if it ignores the fact that they regard the flag as a symbol of their country's power and prestige, and will be impatient if any open disrespect is shown towards it. By the statute in question the State has in substance declared that no one subject to its jurisdiction shall use the flag for purposes of trade and traffic, a purpose wholly foreign to that for which it was provided by the Nation. Such an use tends to degrade and cheapen the flag in the estimation of the people, as well as to defeat the object of maintaining it as an emblem of National power and National honor. And we cannot hold that any privilege of American citizenship or that any right of personal liberty is violated by a state enactment forbidding the flag to be used as an advertisement on a bottle of beer. It is familiar law that even the privileges of citizenship and the rights inhering in personal liberty are subject, in their enjoyment, to such reasonable restraints as may be required for the general good. Nor can we hold that any one has a right of property which is violated by such an enactment as the one in question. If it be

said that there is a right of property in the tangible thing upon which a representation of the flag has been placed, the answer is that such representation — which, in itself, cannot belong, as property, to an individual — has been placed on such a thing in violation of law and subject to the power of Government to prohibit its use for purposes of advertisement.

Looking then at the provision relating to the placing of representations of the flag upon articles of merchandise for purposes of advertising, we are of opinion that those who enacted the statute knew, what is known of all, that to every true American the flag is the symbol of the Nation's power, the emblem of freedom in its truest, best sense. It is not extravagant to say that to all lovers of the country it signifies government resting on the consent of the governed; liberty regulated by law; the protection of the weak against the strong; security against the exercise of arbitrary power; and absolute safety for free institutions against foreign aggression. As the statute in question evidently had its origin in a purpose to cultivate a feeling of patriotism among the people of Nebraska, we are unwilling to adjudge that in legislation for that purpose the State erred in duty or has infringed the constitutional right of anyone. On the contrary, it may reasonably be affirmed that a duty rests upon each State in every legal way to encourage its people to love the Union with which the State is indissolubly connected. . . .

JAMES BROWN SCOTT.

THE DANISH WEST INDIES

On March 31, 1917, the transfer of the Danish West Indies from Denmark to the United States took place by the payment of the purchase price to Denmark by the United States, the transfer of physical possession of the Islands from Danish to American officials and the replacing of the Danish flag by that of the United States.

An outline of the treaty of cession and of the previous efforts of the United States to acquire the islands appeared in this JOURNAL for October, 1916, page 853. The official text of the treaty is now printed in the Supplement to this number of the JOURNAL, page 53.

In advising and consenting to the ratification of the treaty, the Senate of the United States, in order to bring the convention clearly within the Constitutional powers of the United States with respect to church establishment and freedom of religion, stipulated that the convention shall not be taken or construed as "imposing any trust upon the United States with respect to any funds belonging to the Danish National Church in the Danish West Indian Islands, or in which the said church may have an interest, nor as imposing upon the United States any duty or responsibility with respect to the management of any property belonging to said church, beyond protecting said church

in the possession and use of church property as stated in said convention, in the same manner and to the same extent only as other churches shall be protected in the possession and use of their several properties." This stipulation was incorporated in an exchange of notes on January 3, 1917, between the Secretary of State and the Danish Minister, which notes are also printed in the Supplement.

The motives which have actuated the United States in its efforts to acquire the islands, now crowned with success, are too well known to require any extended comment. The present views of the United States on this subject were succinctly placed before Congress at its last session by Secretary of State Lansing in recommending the appropriation of the purchase money so as to carry out the treaty now in force. Mr. Lansing said:

> This convention is responsive to the conviction of both governments, as well as of the people of the islands, that the Danish West Indies should belong to the United States. This conviction, as is well known, has been manifested in earlier treaties for the transfer of these islands to the United States. Without entering upon any extended historical review of the negotiations of these earlier treaties, it may be pointed out that the first negotiations for the purchase of the islands were initiated by Secretary Seward during the administration of President Lincoln and before the close of the Civil War, culminating in the convention signed at Copenhagen October, 24, 1867, during the administration of President Johnson, for the cession of the Islands of St. Thomas and St. John. It is the opinion of students of this subject that this convention was brought about through the conviction of the United States, gained by its naval operations during the Civil War, of the need of a naval coaling supply and repair station in the Caribbean Sea in order that the United States might be placed on a footing with other great Powers owning islands in those waters. This conviction, no doubt, was strengthened by the fact that the United States emerged from that war as a maritime Power to whom a good harbor and depot in the West Indies had become a matter of so great importance, if not of necessity, that the United States could not wish to see the Danish West Indies fall into the hands of another Power.
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> Although the plebiscite in St. Thomas and St. John held under the treaty of 1867 was overwhelmingly in favor of the cession, and the treaty was promptly approved by the Danish Rigsdag and ratified and signed by the King, and although the period for ratification was extended from time to time to April 14, 1870, the Senate Committee on Foreign Relations took no action until March 24, 1870, when Senator Sumner reported it adversely and the Senate acquiesced in that opinion.
>
> Prior to the Spanish War overtures were again made for the cession of the islands — this time initiated by the Danish Government. During the Spanish War the question of the purchase of the islands was further agitated. Concurrently with the discussion of the Isthmian Canal and the protection of the islands obtained from Spain, a second treaty for the purchase of the Danish West Indies was signed at

Washington, January 24, 1902. In reporting this treaty favorably to the Senate, Senator Cullom, of the Committee on Foreign Relations, stated:

"These islands, together with Porto Rico, are of great importance in a strategic way, whether the strategy be military or commercial. St. Thomas is the natural point of call for all European trade bound to the West Indies, Central America, or northern South America. These islands, together with Porto Rico, form the northeastern corner of the Caribbean Sea, and are of great importance in connection with the American isthmus, where a canal will be constructed between the Atlantic and Pacific. They are of first importance in connection with our relations to the region of the Orinoco and the Amazon and with our control of the Windward Passage."

The treaty was approved by the United States Senate February 17, 1902, but failed of ratification by a tie vote in the upper house of the Danish Rigsdag.

All of the reasons upon which the two prior treaties were based, whether strategic, economic, or political, are of more force to-day than in previous years. There can be no question as to the value of St. Thomas Harbor as a naval port, with its circular configuration, ample roadsteads, protection from prevailing winds and seas, and facilities for fortifications. Moreover, the advantages of the possession of a naval base off the entrance of the Panama Canal and near the island of Porto Rico are self-evident.

The commercial value of the islands cannot be doubted. Lying in close proximity to many of the passages into the Caribbean Sea, the use of St. Thomas Harbor as a supply station for merchant ships plying between the United States and South America, and for vessels in other trades, is of great importance. The existing modern harbor works, floating docks, marine slip and wharves provided with electric cranes, oil reservoirs, coal depots, fresh-water tanks, machine shops, and warehouses contribute to the commercial advantages of St. Thomas Harbor as a port of call and transshipment for ships in the Central and South American trades.

The political importance of extending American jurisdiction over the islands is not to be overlooked. The Caribbean is within the peculiar sphere of influence of the United States, especially since the completion of the Panama Canal, and the possibility of a change of sovereignty of any of the islands now under foreign jurisdiction is of grave concern to the United States. Moreover, the Monroe Doctrine, a settled national policy of the United States, would have caused this country to look with disfavor upon the transfer of sovereignty of the Danish West Indies to any other European nation.

In view of these considerations, the treaty of cession of these islands to the United States is a matter of no small moment in this country. I do not hesitate, therefore, to recommend that the Congress be urged to take action during the present session to enable this Government to discharge its conventional obligation to Denmark by the payment to the Government of Denmark of the sum of $25,000,000 by April 17 next.[1]

On March 3, 1917, the President approved an Act of Congress to provide a temporary government for the Danish West Indies. This Act is also printed in the Supplement to this JOURNAL, page 96. The

[1] House Report, No. 1505, 64th Cong. 2d Sess.

Act gives the President authority to assign an officer of the Army or of the Navy to serve as governor of the islands. After careful consideration it was decided that the islands should be administered by the Navy Department, instead of the War Department which governs the other insular possessions of the United States. Rear Admiral James H. Oliver has been appointed the first American governor.

GEORGE A. FINCH.

DEMOCRATIC RUSSIA

ON July 4, 1776, the thirteen United States of America proclaimed their independence in a document which has not yet lost its point or application, and, in doing so, laid down certain principles which were revolutionary then and now, and which will engender revolutions until they shall triumph, not merely in the minds and hearts of men, but in the form of government and in the practice of nations.

> We hold these truths (the Declaration runs) to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness. That to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed, That whenever any Form of Government becomes destructive of these ends, it is the Right of the People to alter or to abolish it, and to institute new Government, laying its foundation on such principles and organizing its powers in such form, as to them shall seem most likely to effect their Safety and Happiness. Prudence, indeed, will dictate that Governments long established should not be changed for light and transient causes; and accordingly all experience hath shown that mankind are more disposed to suffer, while evils are sufferable, than to right themselves by abolishing the forms to which they are accustomed. But when a long train of abuses and usurpations, pursuing invariably the same Object, evinces a design to reduce them under absolute Despotism, it is their right, it is their duty, to throw off such Government, and to provide new Guards for their future security.

The last people to confess its faith in the right of the people to alter or abolish a form of government which had become destructive of these ends and to institute new government "as to them shall seem most likely to effect their safety and happiness" is the Russian people, and, like the revolutionary statesmen of 1776, the revolutionary statesmen of Russia of 1917 have issued an appeal to the peoples in accordance with "a decent respect to the opinions of mankind." The facts which they submitted to a candid world are contained in the appeal of the Executive Committee dated March 18, 1917, and, omitting the

names of the Cabinet, this important document, this charter of liberty and of a nation's hope follows in full:

Citizens: The Executive Committee of the Duma, with the aid and support of the garrison of the capital and its inhabitants, has succeeded in triumphing over the obnoxious forces of the old regime in such a manner that we are able to proceed to a more stable organization of the executive power, with men whose past political activity assures them the country's confidence.

[The names of the members of the new Government are then given and the appeal continues:]

The new Cabinet will base its policy on the following principles:

First — An immediate general amnesty for all political and religious offenses, including terrorist acts and military and agrarian offenses.

Second — Liberty of speech and of the press; freedom for alliances, unions, and strikes, with the extension of these liberties to military officials within the limits admitted by military requirements.

Third — Abolition of all social, religious, and national restrictions.

Fourth — To proceed forthwith to the preparation and convocation of a constitutional assembly, based on universal suffrage, which will establish a governmental regime.

Fifth — The substitution of the police by a national militia, with chiefs to be elected and responsible to the Government.

Sixth — Communal elections to be based on universal suffrage.

Seventh — The troops which participated in the revolutionary movement will not be disarmed, but will remain in Petrograd.

Eighth — While maintaining strict military discipline for troops on active service, it is desirable to abrogate for soldiers all restrictions in the enjoyment of social rights accorded other citizens.

The Provisional Government desires to add that it has no intention to profit by the circumstances of the war to delay the realization of the measures of reform above mentioned.

We do not know at the present writing the history of the movement which resulted in the abdication of the Romanoffs and the substitution in their place of a government "of the people, by the people and for the people." We know that the leaders of thought in Russia have prayed, have lived, have worked, have died for better things, and we who believe in better things know that they have not worked and died in vain. The immediate cause of the overthrow of the Romanoff dynasty seems to have been the issue of two ukases suspending the sittings of the Duma and the Council of the Empire, but behind this was the longing for better things which took advantage of the condition produced by the unwisdom of the Czar, just as it would have taken advantage of a favorable condition at some future time. On the

same fateful day of March 16, 1917, the Czar abdicated the throne which was not longer his in favor of his brother, the Grand Duke Michael, and the latter gentleman, either believing in the American doctrine of the consent of the governed, or not quite sure that the brother could pass title to what he no longer possessed, would apparently have none of it, unless the people should insist upon his accepting the throne. The following is the text of the Czar's abdication:

We, Nicholas II, by the Grace of God Emperor of all the Russias, Czar of Poland, and Grand Duke of Finland, etc., make known to all our faithful subjects:

In the day of the great struggle against a foreign foe, who has been striving for three years to enslave our country, God has wished to send to Russia a new and painful trial. Interior troubles threaten to have a fatal repercussion on the final outcome of the war. The destinies of Russia and the honor of our heroic army, the happiness of the people, and all the future of our dear Fatherland require that the war be prosecuted at all cost to a victorious end. The cruel enemy is making his last effort, and the moment is near when our valiant army, in concert with those of our glorious Allies, will definitely chastise the foe.

In these decisive days in the life of Russia we believe our people should have the closest union and organization of all their forces for the realization of speedy victory. For this reason, in accord with the Duma of the Empire, we have considered it desirable to abdicate the throne of Russia and lay aside our supreme power.

Not wishing to be separated from our loved son, we leave our heritage to our brother, the Grand Duke Michael Alexandrovitch, blessing his advent to the throne of Russia. We hand over the Government to our brother in full union with the representatives of the nation who are seated in the legislative chambers, taking this step with an inviolable oath in the name of our well-beloved country.

We call on all faithful sons of the Fatherland to fulfill their sacred patriotic duty in this painful moment of national trial and to aid our brother and the representatives of the nation in bringing Russia into the path of prosperity and glory.

May God aid Russia.

And the following is the text of Grand Duke Michael's statement:

This heavy responsibility has come to me at the voluntary request of my brother, who has transferred the imperial throne to me during a preiod of warfare which is accompanied with unprecedented popular disturbances.

Moved by the thought, which is in the minds of the entire people, that the good of the country is paramount, I have adopted the firm resolution to accept the supreme power only if this be the will of our great people, who, by a plebiscite organized by their representatives in a constituent assembly, shall establish a form of government and new fundamental laws for the Russian State.

Consequently, invoking the benediction of our Lord, I urge all citizens of Russia to submit to the Provisional Government, established upon the initiative of the Duma and invested with full plenary powers, until such time, which will follow with as little delay as possible, as the constitutent assembly, on a basis of univer-

sal, direct, equal, and secret suffrage, shall, by its decision as to the new form of government, express the will of the people.

It is a source of congratulation to the Americans that the United States should have been the first nation to recognize the new government of Russia based upon the consent of the governed, for on March 22, 1917, the Honorable David R. Francis, American Ambassador to Petrograd, formally recognized the provisional government on behalf of the United States.

On April 16, 1816, the great Napoleon is reported by De las Casas to have said, after referring to the perilous situation in which the continent of Europe then was, that "in the present state of things before one hundred years all Europe may be all Cossack or all republican." Let us hope that, whether Cossack or republican, the new Europe will accept the principles of the Declaration of Independence and make them realities.

JAMES BROWN SCOTT.

THE ATTITUDE OF THE UNITED STATES TOWARD POLITICAL DISTURBANCES IN CUBA

THE President of the Republic of Cuba is elected for the period of four years, and presidential elections were held on November 1, 1916. President Menocal was the candidate of the conservative party for reëlection. Dr. Alfredo Zayas was the liberal candidate. The election of neither was conceded by the partisans of the other and fraud was freely charged by both parties. The Cuban Government has profited by the experience of the United States in the Hayes-Tilden case by having a Central Commission to which an appeal may be taken in case of contested elections, and an appeal lies in fact and in law from the Central Commission to the Supreme Court of the Island. In case the Supreme Court should not be able to determine the result in a given district or province, it may order a new election in such district or province. This has happened in the case of the Provinces of Santa Clara and Oriente.

Charges were made that the government would not allow the voters freely to cast their ballots in Santa Clara and Oriente and an appeal was made in certain quarters to the United States to send a commission to the Island in order to examine the returns of November first, in order to determine the result of the election. This the United States was unwilling to do, and the United States was also unwilling

to have military pressure exerted by the government in the elections to be held in Santa Clara and Oriente, as it wanted the elections to be free and to express the desires of the Cuban people. The election was held in Santa Clara on the tenth of February, 1917, and resulted in an overwhelming majority for the conservative party. Elections were to have taken place in Oriente on February 20 but before this date the liberals in certain portions of the island, principally in Camaguey and Oriente, resorted to arms.

Some of Zayas' partisans brought pressure upon the United States to intervene, which this country wisely refused to do. In 1906, because of disputed elections, the United States intervened and the liberal party triumphed in the election held during the American occupation. General Miguel Gomez had been the leader of the revolution of 1906 and he was the leader of the revolution of 1917, and his party, if not he himself, would have been the beneficiary if the recent revolution had been successful. President Menocal took vigorous and strong measures to crush the uprising. Gomez himself was captured, and the rebellion broken and elections were set in Oriente. If the United States had not intervened in 1906, the revolution of 1917 would probably not have happened, and, if the United States had intervened in 1917, as it was urged by some liberal leaders to do, the United States would probably have had to intervene whenever a party defeated at the polls or deprived, as it claimed, of its victory by fraud, should resort to revolution and the systematic destruction of life and property.

The attitude of the United States with respect to the uprising in Cuba was set forth in an instruction dated February 10th to the American Minister at Havana, and published in the New York *Times* for February 13, 1917. The text follows:

> The Government of the United States, in view of its relations with the Republic of Cuba and on account of the duties which are imposed upon it by the agreement between the two countries, is regarding with no small concern the question of the new elections in Santa Clara province, which it is understood is an effort to carry out the laws providing the machinery for settling election disputes, and upon which laws the constitutional Government must depend. In this case it is understood that the law provides that election disputes be settled by a Central Committee with an appeal to the Supreme Court of Cuba and ultimately, should the dispute remain unsettled, by a re-election to be held in the districts in dispute.
>
> The Government of the United States is confident that both parties are endeavoring to do their utmost to settle their difficulties through the agencies provided

by law and without having recourse to methods which would cause a disturbance throughout the republic, and it would view with gratification the invoking of the constituted judicial methods by the people of Cuba, particularly at the present time when a great portion of the world is embroiled in armed conflict. Such a settlement of their disputes would undoubtedly stand as a fine example before the world as a case where misunderstandings were being adjusted by law instead of by arms.

The Government of the United States, as a friend of the Republic of Cuba, desires to point out that election controversies have not been unknown within its territory, in which party feeling ran at the highest pitch, and wishes to recall to mind that these disputes have always been settled by legal and peaceful means. The most notable case which has occurred in the United States was the Hayes-Tilden controversy, in which the legally established elective machinery finally decided in favor of the candidate who had the minority of the popular vote. This controversy clearly proved that patriotism was elevated by a resort to law rather than by appeal to arms.

The Government of the United States better than any other nation knows the patriotism of the Cuban people, and, mindful of the patriotic deeds done by the Cuban heroes in their struggles for liberty, is confident that the same patriotic spirit will prevail in the settlement of the present electoral difficulty, and that it will be shown by implicit faith in the legal means which have been established for the settlement of such questions.

In view of the interest which this Government feels for the future of Cuba as a nation highly advanced in patriotism and social development, it is anxious that all the parties should know that their course is being followed by the United States with the closest observance and in the confident expectation that the means provided for by the Cuban Constitution and the laws enacted for this very purpose will bring as a logical result a satisfactory and peaceable settlement of the present difficulties.

Three days later, on February 13, 1917, the American Minister was instructed to deliver a further statement to the Cuban Government, the text of which was as follows, according to the New York *Times* of February 15, 1917:

The Government of the United States has received with the greatest apprehension the reports which have come to it to the effect that there exists organized revolt against the Government of Cuba in several provinces and that several towns have been seized by insurrectionists.

Reports such as these of insurrection against the constituted government cannot be considered except as of the most serious nature, since the Government of the United States has given its confidence and support only to governments established through legal and constitutional methods.

During the last four years the Government of the United States has clearly and definitely set forth its position in regard to the recognition of governments which have come into power through revolution and other illegal methods, and at this time desires to emphasize its position in regard to the present situation in Cuba.

Its friendship for the Cuban people, which has been shown on repeated occa-

sions, and the duties which are incumbent upon it on account of the agreement between the two countries, force the Government of the Uuited States to make clear its future policy at this time.

In response to these various communications, the Cuban Secretary of State, Dr. Pablo Desvernines, issued a statement of the Cuban attitude, which is in part as follows:

Some erroneous information must have been given to the Government of the United States when it believes it necessary to express to the President (of Cuba) its anxiety with respect to the elections which are to be held in the Province of Santa Clara, and to remind him of the legal dispositions which regulate electoral matters here.

The Government of Cuba surely will do nothing contrary to law and justice. But precisely because of its desire that these laws should be complied with, neither will it permit anyone here to disturb order or to try, by fraud or violence, to alter legal procedure under which elections should be held, and will energetically repress any illegal attempt of this kind, as it is now proceeding, by means of competent tribunals, in a criminal suit begun because of the discovery of a conspiracy seemingly against the life of the President of the Republic.

Finally, the United States considered it advisable, in view of all the circumstances, to restate its position, in order that there might be no doubt or uncertainty in the minds of the Cuban people as to its attitude in the premises. Therefore, on February 20, 1917, Secretary Lansing sent the following instructions to the American Minister:

It is hardly necessary to state that the events of the past week in connection with the revolt against the Government of Cuba have been viewed with the closest scrutiny by the Government of the United States, which government having set forth its attitude in previous statements, in regard to the confidence and support which it gives to constitutional governments and the policy which it has assumed towards the disturbance of peace through revolutionary methods, wishes again to inform the Cuban people as to its present position:

1. The Government of the United States supports and sustains the constitutional government of the Republic of Cuba.

2. The armed revolt against the constitutional government of Cuba is considered by the Government of the United States as a lawless and unconstitutional act and will not be countenanced.

3. The leaders of the revolt will be held responsible for injury to foreign nationals and for destruction of foreign property.

4. The Government of the United States will give careful consideration to its future attitude towards those persons connected with and concerned in the present disturbance of peace in the Republic of Cuba.

From the passages above quoted, it is evident that the United States did not wish to intervene in Cuba and that it did not intend to

allow itself to be forced to intervene because of the misconduct of the rebels. The United States was not indifferent to the situation in Cuba, but it felt that if frauds had been perpetrated they should be detected and punished according to law, and that the resort should be made to law and not an appeal to arms. The United States did not attempt to decide who was or who was not elected, regarding this as an affair of the Cuban people, but, when some of the partisans of the liberal candidate raised the standard of revolt in February, the United States declared itself squarely on the side of the government, because, whether President Menocal was or was not reëlected on November 1, 1916, he was the constitutional President of Cuba until the expiration of his term on May 20, 1917, and a revolution against his government before May 20th was a rebellion against a duly constituted and recognized government. By an appeal to arms, the liberals put themselves in the wrong and by force of arms they were put down.

It would have been easy for the United States to intervene had it cherished designs upon the independence of Cuba, and the rebels could easily, had they not been discouraged by the mere destruction of life and property, have afforded the United States a pretense for intervention under the third clause of the Platt Amendment. The United States did not, however, invoke the amendment, and the legitimate government, without armed interference from the United States, proved itself strong enough to put down the rebellion. Because of this fact, it will be easier for Cuba to settle its own differences without calling in the guarantor of its independence, and it will be easier for the United States to refuse to intervene, because it has been shown in 1917 that intervention was unnecessary. The two governments apparently understand one another, and each is as apparently unwilling as the other to invoke the Platt Amendment.[1]

JAMES BROWN SCOTT.

[1] For the origin and purpose of the Platt Amendment, see editorial in this JOURNAL for July, 1914, p. 585.

CHRONICLE OF INTERNATIONAL EVENTS

WITH REFERENCES

Abbreviations: *Ann. sc. pol.*, Annales des sciences politiques, Paris; *Arch. dipl.*, Archives Diplomatiques, Paris; B., boletin, bulletin, bolletino; *P. A. U.*, bulletin of the Pan-American Union, Washington; *Cd.*, Great Britain, Parliamentary Papers; *Clunet*, J. de Dr. Int. Privé, Paris; *Current History* — Current History — A Monthly Magazine of the New York Times; *Doc. dipl.*, France, Documents diplomatiques; *B. Rel. Ext.*, Boletin de Relaciones Exteriores; *Dr.*, droit, diritto, derecho; *D. O.*, Diario Official; *For. rel.*, Foreign Relations of the United States; *Ga.*, gazette, gaceta, gazzetta; *Int.*, international, internacional, internazionale; *J.*, journal; *J. O.*, Journal Officiel, Paris; *L.*, Law; *M.*, Magazine; *Mém. dipl.*, Memorial diplomatique, Paris; *Monit.*, Belgium, Moniteur belge; *Martens*, Nouveau recueil générale de traités, Leipzig; *Q.* Quarterly *Q. dip.*, Questions diplomatiques et coloniales; *R.*, review, revista, revue, rivista; *Reichs G.*, Reichs-Geseztzblatt, Berlin; *Staats.*, Staatsblad, Netherlands; *State Papers*, British and Foreign State Papers, London; *Stat. at L.*, United States Statutes at Large; *Times*, The Times (London).

May, 1916.

20 GREAT BRITAIN — PORTUGAL. Ratifications exchanged of the treaty of commerce and navigation signed Aug. 12, 1914. English and Portuguese texts: *G. B. Treaty Series*, 1916, No. 6.

August, 1916.

22 COLOMBIA — VATICAN. Colombia abrogated the Concordat signed Dec. 31, 1887. Text: *R. de la Instrucción Pública, 28*:557.

24 FRANCE — GREAT BRITAIN. Agreement signed respecting trade with Morocco and Egypt in transit through British and French territories in Africa. Text: *G. B. Treaty Series*, 1916, No. 7.

September, 1916.

8 HONDURAS — NICARAGUA. Statement previously made that Honduras had filed suit against Nicaragua in the Central American Court of Justice was incorrect. This JOURNAL, *10*:904.

October, 1916.

25 FRANCE — GREAT BRITAIN — RUSSIA. Exchange of notes modifying Article 2 of the convention of Nov. 9, 1914, relating to prizes captured during the present war. Text: *G. B. Treaty Series*, 1916, No. 5.

December, 1916.

7 GREAT BRITAIN — UNITED STATES. Ratifications exchanged of the treaty for the protection of migratory birds signed Aug. 16, 1916. Date of ratification previously stated as Dec. 9. Text: *U.S. Treaty Series*, No. 628; this JOURNAL, *11*:172.

11 GERMANY — UNITED STATES. Germany replied to the American protest against the deportations of Belgians, dated Nov. 15–29. *Text issued by the Dept. of State; Current History, 5*:674.

12 GERMANY. Germany addressed identic notes to the neutral Powers and a note to The Vatican suggesting that the time had arrived for the consideration of the terms upon which the present war might be ended. Texts of notes: *Current History, 5*:588.

12 AUSTRIA. Austria issued statement relative to the German peace proposal of even date. Text: *Current History, 5*:589.

14 RUSSIA. Semi-official statement made relative to the German peace note of Dec. 12. Resolutions passed by the Duma. Texts: *Current History, 5*:590; *London Times*, Dec. 15, 16, 1916.

19 ITALY. Italy replied to the German peace note of Dec. 12. Text: *Current History, 5*:591.

20 AUSTRIA. Count Clam Martinez became prime minister of Austria. *N. Y. Times*, Dec. 21, 1916.

22 DENMARK, NORWAY AND SWEDEN addressed identic notes to the belligerents relative to bringing the present war to an end. *N. Y. Times*, Jan. 17, 1917.

23 AUSTRIA. Baron Burian succeeded as Minister for Foreign Affairs by Count von Chudnitz. *N. Y. Times*, Dec. 24, 1916.

23 FRANCE-GREAT BRITAIN. Declaration signed concerning the exchange of parcels post between New Zealand and the French settlements of Oceanica. French and English texts: *G. B. Treaty Series*, 1917, No. 2.

23 FRANCE-GREAT BRITAIN. Agreement signed concerning the exchange of post office money orders between Mauritius and Madagascar. French and English texts: *G. B. Treaty Series*, 1917, No. 1.

23 SWITZERLAND. Swiss Government in note to neutrals and belligerents acknowledging the note from President Wilson of Dec. 18, 1916, offers services to assist in bringing about peace. Text: *N. Y. Times* Dec. 25, 1916; *Independent* Jan. 8, 1917.

25 RUSSIA. The Czar of Russia issued proclamation relative to terms of peace. Text: *London Times (Weekly ed.)*, Jan. 5, 1917.

26 AUSTRIA. Austrian Government replied to the note of President Wilson dated Dec. 18, 1916. Text: *Current History*, *5*:783.

26 GERMANY. German Government replied to the note of President Wilson dated Dec. 18, 1916. *Text issued by the Dept. of State; Independent*, Jan. 8, 1917.

26 TURKEY. The Turkish Government replied to the note of President Wilson dated Dec. 18, 1916. *Text issued by the Dept. of State.*

28 GERMANY. German Government replied to the Swiss note of Dec. 23, 1916. Text: *N.Y. Times*, Dec. 29, 1916.

29 DENMARK, NORWAY AND SWEDEN. These governments replied in identic notes to the note of President Wilson dated Dec. 18, 1916. Text: *N. Y. Times*, Dec. 30, 1916.

30 BULGARIA. Bulgarian Government replied to the note of President Wilson dated Dec. 18, 1916. *Text issued by the Dept. of State.*

30 ENTENTE ALLIES. Replied to the proposal of the Central Powers relative to the suggestion that means for ending the present war might now be considered, dated Dec. 12, 1916. Text: *N. Y. Times*, Dec. 31, 1916; *Current History*, *5*:801.

30 GREECE. King Constantine replied to the note of President Wilson dated Dec. 18, 1916. Text: *N. Y. Times*, Jan. 1, 1917; *Current History*, *5*:792.

30 SPAIN. Spanish Government replied to the note of President Wilson dated Dec. 18, 1916. Text: *Current History*, *5*:792.

January, 1917.

1 AUSTRIA-HUNGARY. Austro-Hungarian Government replied to the Scandinavian note of Dec. 22, 1916. Text: *N. Y. Times*, Jan. 2, 1917.

1 GERMANY. German Government acknowledged the Scandinavian peace note of Dec. 22, 1916. Text: *N. Y. Times*, Jan. 4, 1917.

1 TURKEY. Turkish Government announced the abrogation of the Treaty of Paris, signed March 10, 1856, and the Treaty of Berlin, signed Aug. 3, 1878. Text: *Current History*, *5*:822; *N. Y. Times*, Jan. 2, 1917.

3 FRANCE. Contraband list published, additional to the lists of Oct. 14, 1915, Jan. 27, April 3, June 28, Oct. 13, and Nov. 23, 1916. *J. O.*, *1917*:51.

5 FRANCE — SWITZERLAND. Announcement made that France had renewed assurances concerning Swiss neutrality. *London Times* (*Weekly ed.*), Jan. 12, 1917.

6 NICARAGUA. General Emilio Chamorro inaugurated President. *N. Y. Times*, Jan. 7, 1917.

7 UNITED STATES. The Senate indorsed the note of President Wilson, dated Dec. 18, 1916, by vote of 48 to 17. *N. Y. Times*, Jan. 8, 1917.

9 GREECE. The Entente Allies issued a new ultimatum to Greece demanding acceptance of its terms in 48 hours. Text: *London Times* (*Weekly ed.*), Jan. 12, 1917.

9 GREAT BRITAIN. The Admiralty issued statement defining policy as to arming merchant ships. *N. Y. Times*, Jan. 10, 1917.

9 CHINA. The Chinese Government answered the note of President Wilson dated Dec. 18, 1916. *Text issued by the Dept. of State.*

10 RUSSIA. Prince Golitzen became prime minister in place of M. Trepoff. *London Times* (*Weekly ed.*), Jan. 12, 1917.

10 ENTENTE ALLIES. Reply made to the note of President Wilson dated Dec. 18, 1916. *Text issued by the Dept. of State; Current History*, 5:783.

10 GERMANY — UNITED STATES. The German Consul General in San Francisco, Franz Bopp, and four assistants were found guilty of violating American neutrality by plotting to blow up munition shipments, and sentenced to two years' imprisonment. *N. Y. Times*, Jan. 11, 1917.

10 GREAT BRITAIN. Order in council issued making terms "enemy goods" and "enemy origin" apply to goods destined for or originating in enemy territory, and the term "enemy property" apply to all goods of persons domiciled in enemy country. *London Gazette*, No. 29990; *text issued by the Dept. of State.*

11 GERMANY. German Government sent note to neutrals relative to the refusal of the Entente Allies to consider the German peace proposal made Dec. 12, 1916. Text: *Current History*, 5:789; *London Times*, (*Weekly ed.*) Jan. 19, 1917.

11 AUSTRIA-HUNGARY. Austro-Hungarian Government sent note to neutral Powers relative to the refusal of the Entente Allies to consider the German peace proposal made Dec. 12, 1916. Summary: *N. Y. Times*, Jan. 13, 1917.

11 GREECE. Accepted the demands of the Entente Allies. *London Times (Weekly ed.)*, Jan. 12, 1917.

13 ENTENTE ALLIES. Note supplemental to the reply of Jan. 10, made to the note of President Wilson dated Dec. 18, 1916. Text: *Current History, 5*:786; *London Times (Weekly ed.)*, Jan. 19, 1917; *text issued by the Dept. of State.*

15 ITALY. Accession of Italy to the convention of Nov. 9, 1914 between the United Kingdom and France relating to prizes captured during the present war. English and Italian texts: *G. B. Treaty series*, 1917, No. 6.

15 MEXICO — UNITED STATES. The American-Mexican joint commission was dissolved. *N. Y. Times*, Jan. 16, 1917.

15 PERSIA. The Persian Government replied to the note of President Wilson dated Dec. 18, 1916. Text: *N. Y. Times*, Jan. 16, 1917.

16 GREECE. The Greek Government replied to the note of President Wilson dated Dec. 18, 1916. The King of Greece sent personal reply on Dec. 30, 1916. Summary: *N. Y. Times*, Jan. 1, 17, 1917; *Current History, 5*:792.

17 ENTENTE ALLIES. Replied to the Scandinavian note of Dec. 22, 1916. *N. Y. Times*, Jan. 17, 1917.

17 DANISH WEST INDIES. Ratifications exchanged of the treaty for the cession of Danish West Indies to the United States by Denmark. On March 3, Public Act 389 provided for the payment of the purchase price of $25,000,000, and also for the civil government of the islands. English and Danish texts: *U. S. Treaty Series*, No. 629.

17 VATICAN. The Vatican sent a note to the German government relative to the deportations of Belgians. Text: *N. Y. Times*, Jan. 18, 1917.

17 VATICAN. The Vatican answered the German note of Dec. 12, 1916. *N. Y. Times*, Jan. 18, 1917.

18 POLAND. Prince Niemoyovski appointed Viceroy of Poland. *Independent*, Jan. 29, 1917.

19 GERMANY — MEXICO. Germany addressed note to the German minister to Mexico informing him of Germany's intention to begin unrestricted submarine warfare on February 1, and under certain circumstances authorizing him to propose to the Mexican Government to join Mexico in making war upon the United States, promising Mexico general financial support and the lost

Mexican states of Arizona, New Mexico, and Texas. He was further instructed to suggest that Mexico communicate with the Government of Japan and on its own initiative offer mediation between Germany and Japan. Text: *N. Y. Times*, March 1, 1917.

20 GERMANY. The German Government sent memorial to the United States defending the deportations of Belgians. Text: *Current History*, *5*:1107.

22 UNITED STATES. President Wilson addressed the Senate on the subject of peace and the formation of a League to Enforce Peace. *Text issued by the Dept. of State; N. Y. Times*, Jan. 23, 1917.

23 CHINA — JAPAN. The Chengehia-tung incident which occurred in August, 1916, settled by agreement. Summary: *London Times* (*Weekly ed.*), Feb. 2, 1917.

24 GREAT BRITAIN. Notice given to take effect Feb. 7, 1917, that certain defined areas in the North Sea will be dangerous to shipping. To meet the need of the Netherland coastal traffic a safe passage is left and defined. *Text issued by the Dept. of State; Current History*, *5*:995.

27 COSTA RICA. The President of Costa Rica, Alfonso Gonzales, deposed by military force and the administrative power conferred on the Minister of War, Federico Tinoco. *N. Y. Times*, January 28, 1917.

28 BELGIUM. The Belgian Legation at Washington issued a statement replying to the German memorial relative to Belgian deportations. Text: *Current History*, *5*:1110.

31 MEXICO. Delegates to the Mexican Constitutional convention signed the new constitution. *Mexican Review*, March, p. 2.

31 GERMANY. The German Government sent note to the United States acknowledging the receipt of the President's message to Congress of Jan. 22, and stating Germany's position relative to European peace. With this note were two memoranda declaring a blockade of the ports of the Entente Allies and prescribing conditions for American vessels trading therein. *Texts issued by the Dept. of State; Current History*, *5*:963; *N. Y. Times*, Feb. 2, 1917.

31 AUSTRIA-HUNGARY — UNITED STATES. Austria-Hungary sent note acknowledging receipt of the President's address of January 22, and stating Austria-Hungary's position relative to European

peace. Announcement is made of the blockade of the ports of the Entente Allies. *Text issued by the Dept. of State.*

February, 1917.

3 GERMANY — UNITED STATES. The United States broke off diplomatic relations with Germany and handed passports to Count von Bernstorff, German Ambassador. Under safe conduct granted by the Entente Allies, Count von Bernstorff and his party, numbering 149 persons, sailed on the Scandinavian liner *Frederik VIII* on February 14. The ship by agreement put into the port of Halifax for examination by the English authorities, and arrived at Christiania March 10. Text of note: *Current History, 5*:972; *N. Y. Times,* Feb. 4, 1917; March 11, 1917.

3 GERMANY — UNITED STATES. The Secretary of the Navy ordered the commanders of the various navy yards to take such steps as might be necessary for the safety of interned German ships. The crews of the *Kronprinz Wilhelm* and the *Eitel Friedrich* were placed in isolation barracks. The Prize crew of the *Appam* was taken off and the ship placed in the custody of the U. S. Marshal. The *Kronprinzessin Cecile,* owing to civil suits against her owners still pending nominally in the possession of the U. S. Marshal, was taken actual possession of. Police guards were placed on all piers where German and Austrian vessels, some 91 in number, were interned. In anticipation of seizure by the United States all interned ships had been so badly damaged as to be rendered useless. At Charleston, S.C., the German freighter *Liebenfels* was scuttled in the harbor. German and Austrian ships in the Canal Zone and Philippines were taken possession of by the Government. On Feb. 4 the United States issued a statement that it was not the intention of the government to seize the ships but merely to take steps to prevent interference with navigation. Statement in explanation of the seizures was made Feb. 7, by the Secretary of War. Text: *Current History, 5*:978; *N. Y. Times,* Feb. 4, 8, 1917.

3 GERMANY — UNITED STATES. The United States demanded the release of 63 Americans captured on British vessels in the South Atlantic and held as prisoners. On Feb. 28 four of these were released, the remainder being held in quarantine until March 8, when they were released and sent to Switzerland. *N. Y. Times,* March 2, 9, 1917.

4 UNITED STATES. Instructions issued to American representatives in neutral countries to announce the breaking off of diplomatic relations with Germany. Text: *Current History*, *5*:582; *N. Y. Times*, Feb. 4, 1917.

4 GERMANY. The American Ambassador at Berlin informed the United States that Germany had announced its intention to treat all armed merchantmen as warships. *N. Y. Times*, Feb. 7, 1917.

5 MEXICO — UNITED STATES. The last of the American forces were withdrawn from Mexico. *N. Y. Times*, Feb. 6, 1917.

5 GERMANY — UNITED STATES. The American Ambassador to Germany, Mr. Gerard, asked for and received his passports. Mr. Gerard, with his party, including 110 Americans in addition to his family and staff, left Berlin February 10, for Switzerland. *N. Y. Times*, Feb. 6, 11, 1917.

5 NICARAGUA — UNITED STATES. The Nicaraguan Congress by a majority of 14 adopted a resolution urging the President of Nicaragua to obtain the withdrawal of American forces from Nicaragua. *Washington Post*, Feb. 6, 1917.

5 MEXICO. The new constitution of Mexico was promulgated. Text: *Mexican Review*, March 1917, p. 2.

5 UNITED STATES. The President issued a proclamation barring the transfer of American ships to foreign registry. Text: *N. Y. Times*, Feb. 6, 1917.

6 BRAZIL — GERMANY. The Government of Brazil replied to the German notification of the new submarine policy, protesting against the same. Text: *Current History*, *5*:985; *N. Y. Times*, Feb. 11, 1917.

6 SPAIN — GERMANY. The Government of Spain replied to the German notification of the new submarine policy, protesting against the same. Text: *Current History*, *5*:983.

7 THE CALIFORNIAN. The British transatlantic steamer *Californian* sunk without warning. *N. Y. Times*, Feb. 8, 1917.

7 GERMANY — UNITED STATES. The Senate, by a vote of 78 to 5, indorsed the President's action in breaking off diplomatic relations with Germany. *N. Y. Times*, Feb. 8, 1917.

8 GERMANY — UNITED STATES. The German Foreign Office requested Ambassador Gerard to sign a protocol reaffirming the treaties of 1799 and 1828, parts of which were abrogated by the

Seamen's Act, approved March 4, 1915. This Mr. Gerard refused to do. *N. Y. Times*, Feb. 12, 1917.

8 SWEDEN — UNITED STATES. Sweden replied to the American note of Feb. 5, announcing the breaking off of diplomatic relations with Germany. Text: *N. Y. Times*, Feb. 9, 1917.

8 URUGUAY — GERMANY. Uruguay replied to the German notification of the new submarine policy, protesting against the same. *N. Y. Times*, Feb. 9, 1917.

8 PERU. Replied to the German notification of the new submarine policy, protesting against the same. Summary: *Current History*, *5*:986.

9 ARGENTINE REPUBLIC. Replied to the American note of Feb. 5, announcing the breaking off of diplomatic relations with Germany. *Washington Post*, Feb. 10, 1917.

9 CHINA. The Chinese cabinet indorsed the action of President Wilson in breaking off diplomatic relations with Germany. *N. Y. Times*, Feb. 11, 1917.

10 PERU. Replied to the American note of Feb. 5, 1917, announcing the breaking off of diplomatic relations with Germany. Summary: *Current History*, *5*:986.

10 SWITZERLAND. Replied to the American note of Feb. 5, announcing the breaking off of diplomatic relations with Germany. Summary: *N. Y. Times*, Feb. 12, 1917.

10 GERMANY — UNITED STATES. A Manila firm levied on 31 German vessels held in Cebu, Manila, Iloilo, to recover half a million pesos for maintenance of the vessels and crews since the outbreak of the war. The firm, The Behnmeyer Company, of Manila, is a fiscal agent for the German Government. *N. Y. Times*, Feb. 11, 1917.

10 GERMANY — UNITED STATES. The American Ambassador, James Gerard, left Germany for Switzerland, accompanied by consular officers and certain other Americans. *N. Y. Times*, Feb. 11, 1917.

10 GERMANY — UNITED STATES. The Swiss Minister to Washington presented a proposal from Germany for an interpretative and supplemental agreement as to Art. 23 of the treaty of 1799. *Text issued by the Dept. of State.*

10 GERMANY — UNITED STATES. The Swiss Minister, Dr. Ritter, Chargé of German affairs in the United States, presented a memorandum to the Department of State to the effect that

Germany was willing to negotiate formally or informally with the United States provided that the commercial blockade against England was not broken. *Text issued by the Dept. of State; N. Y. Times,* Feb. 13, 1917.

11 CHINA. Replied to the American note of Feb. 5, announcing the breaking off of diplomatic relations with Germany. Text: *Current History, 5*:987.

11 CUBA: Insurrections broke out in several places in Cuba, due to the disputed result of the Presidential elections in November, 1916. On Feb. 10 the United States sent note to the Cuban Government setting forth the policy of the United States toward that government, and on Feb. 13 and 20 further notes were sent. General Gomez, one of the leaders of the insurrection, was captured. On March 8, 400 American marines landed and took charge of Santiago de Cuba, where they remained until order was restored and government troops assumed control. Texts of notes: *N. Y. Times,* Feb. 13, 15; March 9, 16, 1917; this Journal, editional, p. 419.

11 SWITZERLAND. Replied to the German notification of the new submarine policy, protesting against the same. Text: *Current History, 5:* 984.

12 GERMANY — UNITED STATES. The United States replied to the memorandum submitted by the Swiss Minister on February 10, 1917, and accepted the offer to negotiate differences, provided the German proclamation relative to submarine operations of Jan. 31 were withdrawn. *Text issued by the Dept. of State; N. Y. Times,* Feb. 13, 1917.

12 MEXICO. Sent notes to neutrals proposing an embargo on foodstuffs and munitions of war to belligerents. Text: *N. Y. Times,* Feb. 13, 1917; *text issued by the Dept. of State.*

13 DENMARK, NORWAY AND SWEDEN. Identic notes were handed the German ministers to these countries protesting against the new German submarine policy. Summary: *Current History, 5*:986.

13 GREAT BRITAIN. British Admiralty issued revised notice relative to dangerous mined areas in the North Sea. The first British notice of the mining of the North Sea was issued Oct. 3, 1914, and confirmed Oct. 9, 1914, by Notice to Mariners No. 1626 of 1914. *London Gazette,* No. 28935. The second notice was issued Nov. 3, 1914 by Notice to Mariners No. 1706 of 1914. *London Gazette,* No. 28965. *Text issued by the Dept. of State.*

14 GERMANY. The German Ambassador, Count von Bernstorff, sailed from New York on the Scandinavian-American Liner *Frederik VIII*, with his staff, including German consuls. The ship put in at Halifax for examination and arrived in Copenhagen March 14, 1917. *Current History*, *5*:972; *N. Y. Times*, March, 1917.

14 AUSTRIA — UNITED STATES. The *Lyman S. Law*, an American sailing schooner with cargo of lumber, was sunk by an Austrian submarine off Sardinia. *N. Y. Times*, Feb. 15, 1917.

16 GREAT BRITAIN. Order in Council issued relative to the examination of neutral ships. *London Gazette*, No. 29955. Text: *London Times* (*Weekly ed.*), March 2, 1917.

16 FRANCE — SPAIN. French decree promulgating the accord signed Dec. 29, 1916, fixing the judicial relations in Morocco. French text: *J. O. 1917*:1375.

17 GERMANY. The captain of the *Kronprinzessin Cecilie* stated in court that the boat was disabled on orders from the German Embassy. *N. Y. Times*, Feb. 18, 1917.

19 BOLIVIA. Replied to the Mexican note relative to an embargo on foodstuffs and munitions of war, dated Feb. 12, 1917. Summary: *N. Y. Times*, Feb. 20, 1917.

19 UNITED STATES. Replied to the Mexican note relative to an embargo on foodstuffs and munitions of war, dated Feb. 12, 1917. *N. Y. Times*, Feb. 20, 1917.

25 GERMANY. The Cunard steamer *Laconia* sunk by German submarine. *N. Y. Times*, Feb. 26, 27, 28, 1917.

26 UNITED STATES. The President addressed Congress asking authority to arm merchant vessels for defense. Text: *Independent*, *89*:396; *N. Y. Times*, Feb. 27, 1917.

26 ARGENTINE REPUBLIC. Reported that Argentina was attempting to bring about joint action by Latin America in offering mediation in the European war. *N. Y. Times*, March 4, 1917.

28 GERMANY — UNITED STATES. Four of the *Yarrowdale* prisoners who had not been confined in the quarantine camp were released. *N. Y. Times*, March 2, 1917.

March, 1917.

1 CHINA. Reported that the French Minister and the Belgian Chargé representing the Entente Allies have invited China to

enter the war, promising a remission of the Boxer indemnity and a revision of the tariff as inducements. *N. Y. Times*, March 2, 1917.

1 CHINA. Wu ting Fang resigned as Foreign Minister, *N. Y. Times*, March 2, 1917.

1 GERMANY — MEXICO. In response to a Senate Resolution the President of the United States informed the Senate that the government was in possession of evidence establishing the authenticity of the note addressed to the German Minister to Mexico by his government, January 19, 1917, relative to the entry of Mexico into war with the United States in event war was declared between Germany and the United States. The President stated that in the opinion of the Secretary of State it was incompatible with the public interests to give any further information at the present time. Text: *N. Y. Times*, March 2, 1917.

2 PORTO RICO. The President approved the Act of Congress granting citizenship to Porto Ricans. *Public Act 368, 64th Congress, Second Session.*

2 FRANCE — SWEDEN. Ratifications exchanged of a treaty for the reciprocal protection of trade marks signed Jan 31, 1916. *J. O.*, 1917: 2213.

2 AUSTRIA-HUNGARY — UNITED STATES. Austria-Hungary replied to the American note of Feb. 18, inquiring the attitude of Austria on the submarine question. *Text issued by the Dept. of State; N. Y. Times*, March 7, 1917.

3 MEXICO — UNITED STATES. Hon. Henry P. Fletcher, appointed American Ambassador to Mexico Feb. 25, 1916, presented his credentials to the Mexican Government. *N. Y. Times*, March 4, 1917.

4 UNITED STATES. The United States Senate adjourned without voting upon Senate Bill 8322 authorizing the President to arm American merchant vessels. A manifesto, signed by 68 Senators, was issued stating that they favored the measure and would vote for it if a vote could be obtained. Text: *N. Y. Times*, March 4, 1917. A similar bill passed the House of Representatives by a vote of 403 to 13. The President issued a statement to the public on the subject and recommended that the rules of the Senate be amended so as to curtail debate when desirable. Text: *N. Y. Times*, March 5, 1917.

6 THE APPAM. The United States Supreme Court rendered an opinion sustaining the decision of the lower court restoring the ship to the British owners and the cargo to the custody of the master. See this JOURNAL, page 443.

6 WERNER VON HORN. The appeal of Werner von Horn, the German reservist lieutenant who attempted to blow up the International Bridge near Vanceboro, Vermont, in 1915, failed in the Supreme Court on a technical ruling as to a right to appeal. Horn, when arrested, claimed that he intended to blow up the bridge at McAdam, N. B., and therefore he was not amenable to American law. *N. Y. Times*, March 7, 1917.

8 RUSSIA. Protested to Germany, Austria, Bulgaria and Turkey against violations of the laws of war. Summary: *N. Y. Sun*, March 9, 1917.

8 CUBA — UNITED STATES. 400 marines from American warships landed and took charge of Santiago de Cuba at the request of the governor. *N. Y. Times*, March 9, 1917.

8 GERMANY — UNITED STATES. The *Yarrowdale* prisoners, whose release was asked by the United States, Feb. 3, 1917, were released from quarantine and sent to Switzerland. *Washington Post*, March 9, 1917.

10 GERMANY — UNITED STATES. The Swiss Minister presented a protest from Germany against the arming of merchant vessels. *Washington Post*, March 11, 1917.

10 ALBANIA. Austria declared Albania autonomous as an Austrian protectorate. *Independent, 89*:478.

11 MEXICO. General elections held. General Carranza elected President. He was inaugurated May 1, 1917. *Ind. 89:* 483; *N. Y. Times*, May 2, 1917.

12 UNITED STATES. The United States sent a statement to the foreign missions in Washington to the effect that in view of the announcement of Germany, Jan. 31, 1917, that all ships, including those of neutrals, met within certain zones would be sunk, without visit and search and without regard for the safety of persons on board, the United States had determined to place upon all American merchant vessels sailing through the barred zones a guard for the protection of the vessels and the lives of the persons on board. *N. Y. Times*, March 13, 1917; *text issued by the Dept. of State.*

12 TURKEY — UNITED STATES. Turkey has accepted temporarily the four American consuls recently transferred from Germany, under the old form of ex-equatur empowering consuls to act as extraterritorial judges in cases involving American citizens. *Washington Evening Star*, March 13, 1917.

14 CHINA — GERMANY. China severed diplomatic relations with Germany and handed the German Minister his passports. German ships in Chinese ports were seized. The Netherland legation in Pekin took charge of German affairs in China and the Danish Legation in Berlin took charge of Chinese affairs in Germany. *N. Y. Times*, March 15, 1917.

15 RUSSIA. The Czar of Russia, Nicholas II, abdicated at midnight, on behalf of himself and his son the heir apparent Grand Duke Alexis, in favor of his brother Grand Duke Michael. *N. Y. Times*, March 16, 17, 1917.

16 RUSSIA. Grand Duke Michael abdicated the Russian throne at 2:30 P.M. This ends the Romanoff dynasty. *N. Y. Times*, March 17, 1917.

16 RUSSIA. The Provisional Government issued an appeal to the Russian people. The Provisional Government consists of:

Premier: President of the Council and Minister of the Interior: Prince George E. Ivoff.

Foreign Minister: Professor Paul N. Milukoff, of Moscow University.

Minister of Public Instruction: Professor Manuiloff of Moscow University.

Minister of War and Navy—ad interim: A. J. Guchkoff, formerly President of the Duma.

Minister of Agriculture: M. Ichingareff, Deputy from Petrograd.

Minister of Finance: M. Tereschtenko, Deputy from Kiev.

Minister of Justice: M. Kerenski, Deputy from Saratoff.

Minister of Communications: N. V. Nekrasoff, Vice President of the Duma.

Controller of State: M. Godneff, Deputy from Kazan. *N. Y. Times*, March 16, 1917.

16 UNITED STATES — MEXICO. The United States sent a further reply to the Mexican note relative to an embargo on foodstuffs

and munitions of war dated Feb. 12, 1917. *N. Y. Sun*, March 17, 1917; text issued by the *Dept. of State.*

17 UNITED STATES — MEXICO. Mexico replied to the American note of March 16, 1917. Summary: *N. Y. Times*, March 18, 1917.

19 JAPAN — PORTUGAL. Reported that Japan had bought from Portugal the Island of Macao. This island lies on the west side of the Canton River about 75 miles southeast of Canton and 35 west of Hongkong, and has a population of about 80,000. *N. Y. Times*, March 20, 1917.

17 UNITED STATES — GERMANY. The American steamship the *City of Memphis*, bound from Cardiff to New York in ballast, sunk by German submarine. *N. Y. Times*, March 19, 1917.

16 UNITED STATES — GERMANY. The American steamship the *Vigilancia* sunk by German submarine. *N. Y. Times*, March 19, 1917.

17 UNITED STATES. The American tanker *Illinois*, London to Port Arthur, sunk by German submarine. *N. Y. Times*, March 20, 1917.

19 CHINA — GERMANY. Chinese troops took over the German concessions of Hankow and Tien Tsien. *Washington Post*, March 21, 1917.

20 UNITED STATES. The War Risk Insurance Bureau announced that it would insure practically all forms of contraband except arms and ammunition. *N. Y. Times*, March 21, 1917.

20 GERMANY — UNITED STATES. The United States replied to the note of the Swiss Minister proposing an interpretative and supplementary agreement to Article 23 of the treaty of 1799. *Text issued by the Dept. of State.*

20 GREECE. The Entente Allies raised the blockade of Greece and the ministers of these powers returned to Athens. *Washington Post*, March 21, 1917.

20 GERMANY — UNITED STATES. The United States replied to the note of the Swiss minister proposing on behalf of Germany an interpretative and supplementary agreement as to Article 23 of the treaty of 1799, refusing the proposed agreement. *Text issued by the Dept. of State.*

21 UNITED STATES. The President called Congress to meet in extra session on April 2, 1917, instead of April 16, as previously called. *N. Y. Times*, March 22, 1917.

21 UNITED STATES — RUSSIA. The United States recognized the Provisional Government as the *de facto* government of Russia. *N. Y. Times,* March 22, 1917.

21 UNITED STATES — GERMANY. The American steamer *Healdton,* proceeding through the "safe zone" for Rotterdam by way of Bergen, with petroleum, torpedoed without warning, *N. Y. Times,* March 23, 1917.

22 GERMANY. Declared a danger zone in the Arctic Ocean including east of 24° east longitude and south of 75° north latitude. *N. Y. Times,* March 24, 1917.

23 GREAT BRITAIN. Declared an extension of the danger zone in the North Sea. Text: *N. Y. Times,* March 24, 1917.

25 GERMANY. Announcement made of a new barred zone in Arctic waters. Text: *N. Y. Times,* March 26, 1917.

30 GERMANY — NORWAY. Norway protested against the German blockade of Norwegian northern ports announced March 26, 28. *N. Y. Sun,* March 31, 1917.

30 POLAND. The Russian Provisional Government issued a proclamation formally announcing that Poland shall decide for itself its form of government. *Washington Post,* March 31, 1917.

30 GERMANY — UNITED STATES. Germany replied to the charge that Germany had violated the Prussian treaties of 1785, 1799 and 1828. *Text issued by the Dept. of State.*

INTERNATIONAL CONVENTIONS

ADHESIONS, RATIFICATIONS, DENUNCIATIONS

INDUSTRIAL PROPERTY. Washington, June 2, 1911.
Adhesion:
Sweden. *J. O., 1917*:895.

MARRIAGE, GUARDIANSHIP, ETC. The Hague, July 17, 1905.
Denunciation:
France, Jan. 20, 1917. *J. O., 1917*:616.

KATHRYN SELLERS.

PUBLIC DOCUMENTS RELATING TO INTERNATIONAL LAW

GREAT BRITAIN[1]

Contraband of war. Proclamation making certain additions to and amendments in the list of articles to be treated as. St. R. & O. 1916, No. 683. 1½d.

Relief of allied territories in the occupation of the enemy. Correspondence respecting the. Cd. 8348. 4d.

Submarines, belligerent, Treatment of in neutral waters. Memorandum communicated by the Allied Governments to the governments of certain neutral maritime states respecting. Cd. 8349. 1d.

Trading with the enemy. Order in Council, Sept. 29, 1916, further varying the Statutory List contained in Proclamation No. 3. No. 9. 1½d.

Treaties between the United Kingdom and foreign states. Accessions, withdrawals, etc. Treaty Series, 1916, No. 4. 1d.

Typhus epidemic at Gardelegen during the spring and summer of 1915. Report by the government committee on the treatment by the enemy of British prisoners of war. Cd. 8351. 2d.

UNITED STATES[2]

Arbitration. Agreement between Italy and United States, extending duration of convention of March 28, 1908; signed Washington, May 28, 1913, proclaimed April 15, 1914. [Reprint.] Treaty Series 588. [English and Italian.] *State Dept.*

Birds. Convention between United States and Great Britain, for the protection of migratory birds; signed Washington, Aug. 16, 1916, proclaimed Dec. 8, 1916. 6 p. Treaty Series 628. *State Dept.*

Brazil. Treaty for advancement of peace between United States and, signed Washington, July 24, 1914, proclaimed Oct. 30, 1916. 6 p. Treaty Series 627. [English and Portuguese.] *State Dept.*

[1] Official publications of Great Britain may be purchased of Wyman & Sons, Ltd., Fetter Lane, E. C., London, England.

[2] When prices are given, the document in question may be obtained for the amount noted from the Superintendent of Documents, Government Printing Office, Washington, D. C.

Chinese in United States. Treaty, laws, and rules governing admission of Chinese. Edition of October 27, 1916. 48 p. *Immigration Bureau.* Paper, 5c.

Commercial convention between United States and Cuba, signed Havana, Dec. 11, 1902, proclaimed Dec. 17, 1903. [Reprint with changes, 1916.] 12 p. Treaty Series 427. [English and Spanish.] *State Dept.*

Foreign Relations of the United States. List of Government publications for sale by the Superintendent of Documents. November, 1916. 40 p. (Price list 65, 2d ed.)

Immigration. Publications relating to naturalization, citizenship, Europeans, Japanese, Chinese, Negroes, for sale by Superintendent of Documents. November, 1916. 18 p. (Price list 67.)

Immigration and emigration. Conference report to accompany H. R. 10384. Jan. 8, 1917. 6 p. H. rp. 1266.

———. Jan. 13, 1917, 5 p. H. rp. 1291.

———. Report to accompany H. R. 10384 to regulate immigration of aliens to, and residence of aliens in, United States. Dec. 7, 1916. 20 p. S. rp. 352, 64th Cong., 1st sess. *Immigration Committee.*

Immigration bill, Message from President of United States transmitting his veto on. 1917. 3 p. H. doc. 2003.

International High Commission, Report of United States section on first general meeting of commission held at Buenos Aires, April 3–12, 1916. 41 p. H. doc. 1788. Paper, 5c.

International relations, United States and the Orient. Hearings on H. R. 16661 to provide for commission on relations between United States and the Orient; statement by Jane Adams, and others, Dec. 12, 1916. 12 p. *Foreign Affairs Committee.*

Jaeger, Jacob, alias Jacob Hoffman. Report relative to detention of, by Canadian Government, Dec. 6, 1916. 4 p. H. doc. 1447. *State Dept.*

Maritime Canal Company of Nicaragua. Report of, Dec. 2, 1916. 2 p. H. doc. 1428.

Mexican Question. By President Wilson. (From *Ladies' Home Journal*, October, 1916.) 4 p. *State Dept.*

Military law. Revision and codification of military laws of United States, report relative to progress of work. Dec. 6, 1916. 2 p. S. doc. 560. *War Dept.*

Panama Canal. Annual report of the Governor, 1916. 637 p. 3 pl. 58 p. of pl. and portfolio of 48 pl. and 4 maps. Paper, $1.20. H. doc. 1498.

———. Executive order relating to motor vehicles and their operation in roads of Canal Zone. Sept. 5, 1916. 2 p. No. 2451. *State Dept.*

———. Government publications relating to, and to Suez Canal, Nicaragua route, and treaty with Colombia, for sale by Superintendent of Documents. November, 1916. 16 p. (Price list 61, 3d ed.)

———. Slides at. By George W. Goethals. 16 p. [From annual report, 1916.]

Peace, International tribunals to enforce. Hearing before subcommittee on S. J. Res. 131, proposing amendment to Constitution of United States authorizing creation with other nations of international peace-enforcing tribunal or tribunals for determination of all international disputes. Jan. 18, 1917. 30 p. *Senate Judiciary Committee.*

Peace, League for. Address of President of United States delivered to Senate, Jan. 22, 1917. 8 p. S. doc. 685. Paper, 5c.

Porto Rico, Government for. Hearing on S. 1217. pt. 3, 127–151 p. *Pacific Islands and Porto Rico Comm.*

Radio communication. Hearings on H. R. 19350, to regulate. Jan. 11–23, 1917. pts. 1–4, 317 p. *Merchant Marine and Fisheries Committee.*

Supreme Court of the United States. Procedure in case of suit against a State. Hearings on H. R. 18980, Jan. 16, 1917. 36 p. (Serial 49.) *Judiciary Committee. (House.)*

Trade-marks. Convention between the United States and other Powers for protection of, signed Buenos Aires, Aug. 20, 1910; proclaimed Sept. 16, 1916. 28 p. Treaty Series 626. [Spanish, English, Portuguese and French.] *State Dept.*

United States Court for China. Hearings on S. 4014; statement of Wilbur J. Carr, and others, Jan. 10, 1917. 24 p. *Foreign Affairs Committee.*

War Claims, payment of. Report to accompany S. 1878, making appropriation for. Jan. 26, 1917. 20 p. H. rp. 1362. *War Claims Committee.*

West Indies. Message from President of United States transmitting convention between Denmark and United States respecting cession of Danish West Indian Islands to United States, signed New York, Aug. 4, 1916. 8 p. S. Ex. D. 64th Cong., 1st sess. *Senate.*

———. Report of Secretary of State and accompanying papers, recommending appropriation to pay for purchase of Danish West Indies. 1917. 15 p. S. doc. 686. Paper, 5c.

GEORGE A. FINCH.

JUDICIAL DECISIONS INVOLVING QUESTIONS OF INTERNATIONAL LAW

HANS BERG, PRIZE MASTER IN CHARGE OF THE PRIZE SHIP "APPAM," AND L. M. VON SCHILLING, VICE-CONSUL OF THE GERMAN EMPIRE, APPELLANTS,

vs.

(650) BRITISH AND AFRICAN STEAM NAVIGATION CO.

Same,

vs.

(722) HENRY G. HARRISON, MASTER OF THE STEAMSHIP "APPAM."

Supreme Court of the United States

March 6, 1917

Mr. Justice DAY delivered the opinion of the court.

These are appeals from the District Court of the United States for the Eastern District of Virginia, in two admiralty cases. No. 650 was brought by the British & African Steam Navigation Company, Limited, owner of the British steamship, *Appam*, to recover possession of that vessel. No. 722 was a suit by the master of the *Appam* to recover possession of the cargo. In each of the cases the decree was in favor of the libellant.

The facts are not in dispute and from them it appears: That during the existence of the present war between Great Britain and Germany, on the 15th day of January, 1916, the steamship *Appam* was captured on the high seas by the German cruiser, *Moewe*. The *Appam* was a ship under the British flag, registered as an English vessel, and is a modern cargo and passenger steamship of 7800 tons burden. At the time of her capture she was returning from the West Coast of Africa to Liverpool, carrying a general cargo of cocoa beans, palm oil kernels, tin, maize, sixteen boxes of specie, and some other articles. At the West African port she took on 170 passengers, eight of whom were military prisoners of the English government. She had a crew of 160

or thereabouts, and carried a three-pound gun at the stern. The *Appam* was brought to by a shot across her bows from the *Moewe*, when about a hundred yards away, and was boarded without resistance by an armed crew from the *Moewe*. This crew brought with them two bombs, one of which was slung over the bow and the other over the stern of the *Appam*. An officer from the *Moewe* said to the captain of the *Appam* that he was sorry he had to take his ship, asked him how many passengers he had, what cargo, whether he had any specie, and how much coal. When the shot was fired across the bows of the *Appam*, the captain instructed the wireless operator not to touch the wireless instrument, and his officers not to let any one touch the gun on board. The officers and crew of the *Appam*, with the exception of the engine-room force, thirty-five in number, and the second officer, were ordered on board the *Moewe*. The captain, officers and crew of the *Appam* were sent below, where they were held until the evening of the 17th of January, when they and about 150 others, officers and crews of certain vessels previously sunk by the *Moewe*, were ordered back to the *Appam* and kept there as prisoners. At the time of the capture, the senior officer of the boarding party told the chief engineer of the *Appam* he was now a member of the German navy; if he did not obey orders his brains would be blown out, but if he obeyed, not a hair of his head should be touched. The *Appam's* officer was instructed to tell his staff the same thing, and if they did not obey orders they would be brought to the German officer and shot. Inquiries were made by the German officer in command of the *Appam* as to revolutions of the engines, the quantity of coal on hand and the coal consumption for different speeds, and instructions were given that steam be kept up handy, and afterwards, the engineer was directed to set the engines at the revolutions required, and the ship got under way.

Lieutenant Berg, who was the German officer in command of the *Appam* after its capture, told the engineer on the second morning that he was then in charge of the ship, asked of him information as to fuel consumption, and said that he expected the engineer to help him all he could, and the more he did for him the better it would be for everybody on the ship. The engineer said he would, and did so. The engines were operated with a bomb secured to the port main injector valve, and a German sailor stationed alongside the bomb with a revolver. There was a guard below of four or five armed Germans, who were relieved from time to time, but did not interfere with the working

of the ship. The German officer, Lieutenant Berg, gave directions as to working the engines, and was the only officer on board who wore a uniform.

On the night of the capture, the specie in the specie-room was taken on board the *Moewe*. After Lieutenant Berg took charge of the *Appam*, bombs were slung over her bow and stern, one large bomb, said to contain about two hundred pounds of explosive, was placed on the bridge, and several smaller ones in the chart room. Lieutenant Berg informed the captain of the *Appam*, pointing to one of the bombs, "That is a bomb; if there is any trouble, mutiny, or attempt to take the ship, I have orders to blow up the ship instantly." He also said, "There are other bombs about the ship; I do not want to use them, but I shall be compelled to if there is any trouble." The bombs were kept in the positions stated until the ship arrived at the Virginia Capes, when they were removed. Lieutenant Berg, on reaching Hampton Roads, asked the crew of the *Appam* to drop the anchor, as he had not men to do it.

During the trip to the westward, the officers and crew of the *Appam* were not allowed to see the ship's compass to ascertain her course, and all lights were obscured during the voyage. The German prisoners, with the exception of two who went on board the *Moewe*, were armed and placed over the passengers and crew of the *Appam* as a guard all the way across. For two days after the capture, the *Appam* remained in the vicinity of the *Moewe*, and then was started westward. Her course for the first two or three days was southwesterly, and afterwards westerly, and was continued until her arrival at the Virginia Capes on the 31st of January. The engine-room staff of the *Appam* was on duty operating the vessel across to the United States; the deck crew of the *Appam* kept the ship clean, and the navigation was conducted entirely by the Germans, the lookouts being mostly German prisoners.

At the time of the capture, the *Appam* was approximately distant 1590 miles from Emden, the nearest German port; from the nearest available port, namely Punchello, in the Madeiras, 130 miles; from Liverpool, 1450 miles; and from Hampton Roads, 3051 miles. The *Appam* was found to be in first class order, seaworthy, with plenty of provisions, both when captured and at the time of her arrival in Hampton Roads.

The order or commission delivered to Lieutenant Berg by the commander of the *Moewe* is as follows:

Information for the American authorities. The bearer of this, Lieutenant of the Naval Reserve, Berg, is appointed by me to the command of the captured English steamer *Appam* and has orders to bring the ship into the nearest American harbor and there to lay up. Kommando S. M. H. *Moewe*. Count Zu Dohna, Cruiser Captain and Commander. (Imperial Navy Stamp.) Kommando S. M. H. *Moewe*.

Upon arrival in Hampton Roads, Lieutenant Berg reported his arrival to the Collector, and filed a copy of his instructions to bring the *Appam* into the nearest American port and there to lay up.

On February 2d, His Excellency, the German Ambassador, informed the State Department of the intention, under alleged treaty rights, to stay in an American port until further notice, and requested that the crew of the *Appam* be detained in the United States for the remainder of the war.

The prisoners brought in by the *Appam* were released by order of the American Government.

On February 16th, and sixteen days after the arrival of the *Appam* in Hampton Roads, the owner of the *Appam* filed the libel in case No. 650, to which answer was filed on March 3d. On March 7th, by leave of court, an amended libel was filed, by which the libellant sought to recover the *Appam* upon the claim that holding and detaining the vessel in American waters was in violation of the law of nations and the laws of the United States and of the neutrality of the United States. The answer of the respondents to the amended libel alleged that the *Appam* was brought in as a prize by a prize master, in reliance upon the Treaty of 1799 between the United States and Prussia; that by the general principles of international law the prize master was entitled to bring his ship into the neutral port under these circumstances, and that the length of stay was not a matter for judicial determination; and that proceedings had been instituted in a proper prize court of competent jurisdiction in Germany for the condemnation of the *Appam* as a prize of war; and averred that the American court had no jurisdiction.

The libel against the *Appam's* cargo was filed on March 13th, 1916, and answer filed on March 31st. During the progress of the case, libellant moved the court to sell a part of the cargo as perishable; on motion the court appointed surveyors, who examined the cargo and reported that the parts so designated as perishable should be sold; upon their report orders of sale were entered, under which such perishable parts were sold, and the proceeds of that sale, amounting to over $600,000, are now in the registry of the court, and the unsold portions of the

cargo are now in the custody of the marshal of the Eastern District of Virginia.

The argument in this case has taken wide range, and orally and in printed briefs counsel have discussed many questions which we do not consider necessary to decide in determining the rights involved in these appeals.

From the facts which we have stated, we think the decisive questions resolve themselves into three: First, was the use of an American port, under the circumstances shown, a breach of this nation's neutrality under the principles of international law? Second, was such use of an American port justified by the existing treaties between the German Government and our own? Third, was there jurisdiction and right to condemn the *Appam* and her cargo in a court of admiralty of the United States?

It is familiar international law that the usual course after the capture of the *Appam* would have been to take her into a German port, where a prize court of that nation might have adjudicated her status, and, if so determined, condemned the vessel as a prize of war. Instead of that, the vessel was neither taken to a German port, nor to the nearest port accessible of a neutral Power, but was ordered to, and did, proceed over a distance of more than three thousand miles, with a view to laying up the captured ship in an American port.

It was not the purpose to bring the vessel here within the privileges universally recognized in international law, *i.e.*, for necessary fuel or provisions, or because of stress of weather or necessity of repairs, and to leave as soon as the cause of such entry was satisfied or removed. The purpose for which the *Appam* was brought to Hampton Roads, and the character of the ship, are emphasized in the order which we have quoted to take her to an American port and there lay her up and, in a note from His Excellency, the German Ambassador, to the Secretary of State, in which the right was claimed to keep the vessel in an American port until further notice (Diplomatic Correspondence with Belligerent Governments Relating to Neutral Rights and Duties, Department of State, European War No. 3, page 331), and a further communication from the German Ambassador forwarding a memorandum of a telegram from the German Government concerning the *Appam* (*Idem.*, page 333), in which it was stated

> *Appam* is not an auxiliary cruiser but a prize. Therefore she must be dealt with according to Article 19 of Prusso-American Treaty of 1799. Article 21 of Hague

Convention concerning neutrality at sea is not applicable, as this convention was not ratified by England and is therefore not binding in present war according to Article 28. The above-mentioned Article 19 authorizes a prize ship to remain in American ports as long as she pleases. Neither the ship nor the prize crew can therefore be interned nor can there be question of turning the prize over to the English.

In view of these facts, and this attitude of the Imperial Government of Germany, it is manifest that the *Appam* was not brought here in any other character than as a prize, captured at sea by a cruiser of the German navy, and that the right to keep her here, as shown in the attitude of the German Government and in the answer to the libel, was rested principally upon the Prussian-American Treaty of 1799.

The principles of international law recognized by this government, leaving the treaty aside, will not permit the ports of the United States to be thus used by belligerents. If such uses were permitted, it would constitute of the ports of a neutral country harbors of safety into which prizes, captured by one of the belligerents, might be safely brought and indefinitely kept.

From the beginning of its history this country has been careful to maintain a neutral position between warring governments, and not to allow the use of its ports in violation of the obligations of neutrality; nor to permit such use beyond the necessities of such vessels as to seaworthiness, provisions and supplies. Such usage has the sanction of international law, Dana's Note to Wheaton on International Law, 1866, 8th American Edition, Section 391, and accords with our own practice. Moore's Digest of International Law, Vol. 7, 936, 937, 938.

A policy of neutrality between warring nations has been maintained from 1793 to this time. In that year President Washington firmly denied the use of our ports to the French Minister for the fitting out of privateers to destroy English commerce. This attitude led to the enactment of the Neutrality Act of 1794, afterwards embodied in the Act of 1818, enacting a code of neutrality, which among other things inhibited the fitting out and arming of vessels; the augmenting or increasing of the force of armed vessels; or the setting on foot in our territory of military expeditions; and empowering the President to order foreign vessels of war to depart from our ports and compelling them so to do when required by the law of nations. Moore on International Arbitrations, v. 4, 3967 *et seq.*

This policy of the American Government was emphasized in its attitude at the Hague Conference of 1907. Article 21 of the Hague Treaty provides:

> A prize may only be brought into a neutral port on account of unseaworthiness, stress of weather, or want of fuel or provisions.
>
> It must leave as soon as the circumstances which justified its entry are at an end. If it does not, the neutral Power must order it to leave at once; should it fail to obey, the neutral Power must employ the means at its disposal to release it with its officers and crew and to intern the prize crew.

Article 22 provides:

> A neutral Power must, similarly, release a prize brought into one of its ports under circumstances other than those referred to in Article 21.

To these articles, adherence was given by Belgium, France, Austria-Hungary, Germany, the United States, and a number of other nations. They were not ratified by the British Government. This government refused to adhere to Article 23, which provides:

> A neutral Power may allow prizes to enter its ports and roadsteads, whether under convoy or not, when they are brought there to be sequestered pending the decision of a prize court. It may have the prize taken to another of its ports.
>
> If the prize is convoyed by a warship, the prize crew may go on board the convoying ship.
>
> If the prize is not under convoy, the prize crew are left at liberty.

And in the proclamation of the convention the President recited the resolution of the Senate adhering to it, "subject to the reservation and exclusion of its Article 23 and with the understanding that the last clause of Article 3 thereof implies the duty of a neutral Power to make the demand therein mentioned for the return of a ship captured within the neutral jurisdiction and no longer within that jurisdiction." 36 Stat., Pt. II, p. 2438.

While this treaty may not be of binding obligation, owing to lack of ratification, it is very persuasive as showing the attitude of the American Government when the question is one of international law; from which it appears clearly that prizes could only be brought into our ports upon general principles recognized in international law, on account of unseaworthiness, stress of weather, or want of fuel or provisions, and we refused to recognize the principle that prizes might enter our ports and roadsteads, whether under convoy or not, to be

sequestrated pending the decision of a prize court. From the history of the conference it appears that the reason for the attitude of the American delegates in refusing to accept Article 23 was that thereby a neutral might be involved in participation in the war to the extent of giving asylum to a prize which the belligerent might not be able to conduct to a home port. See Scott on Peace Conferences, 1899–1907, Vol. II, pp. 237 *et seq.*

Much stress is laid upon the failure of this government to proclaim that its ports were not open to the reception of captured prizes, and it is argued that having failed to interdict the entrance of prizes into our ports permission to thus enter must be assumed. But whatever privilege might arise from this circumstance it would not warrant the attempted use of one of our ports as a place in which to store prizes indefinitely, and certainly not where no means of taking them out are shown except by the augmentation of her crew, which would be a clear violation of established rules of neutrality.

As to the contention on behalf of the appellants that Article XIX of the Treaty of 1799 justifies bringing in and keeping the *Appam* in an American port, in the situation which we have outlined, it appears that in response to a note from His Excellency, the German Ambassador, making that contention, the American Secretary of State, considering the treaty, announced a different conclusion (Diplomatic Correspondence with Belligerent Governments, *supra*, pages 335 *et seq.*); and we think this view is justified by a consideration of the terms of the treaty. Article XIX of the Treaty of 1799, using the translation adopted by the American State Department, reads as follows:

> The vessels of war, public and private, of both parties, shall carry (*conduire*) freely, wheresoever they please, the vessels and effects taken (*pris*) from their enemies, without being obliged to pay any duties, charges, or fees to officers of admiralty, of the customs, or any others; nor shall such prizes (*prises*) be arrested, searched or put under legal process, when they come to and enter the ports of the other party, but may freely be carried (*conduites*) out again at any time by their captors (*le vaisseau preneur*) to the places expressed in their commissions, which the commanding officer of such vessel (*le dit vaisseau*) shall be obliged to show. [But conformably to the treaties existing between the United States and Great Britian, no vessel (*vaisseau*) that shall have made a prize (*prise*) upon British subjects shall have a right to shelter in the ports of the United States, but if (*il est*) forced therein by tempests, or any other danger or accident of the sea, they (*il sera*) shall be obliged to depart as soon as possible.] (The provision concerning the treaties between the United States and Great Britain is no longer in force, having been omitted by the Treaty of 1828. See Compilation of Treaties in Force, 1904, pages 641 and 646.)

We think an analysis of this article makes manifest that the permission granted is to vessels of war and their prizes, which are not to be arrested, searched, or put under legal process, when they come into the ports of the high contracting parties, to the end that they may be freely carried out by their captors to the places expressed in their commissions, which the commanding officer is obliged to show. When the *Appam* came into the American harbor she was not in charge of a vessel of war of the German Empire. She was a merchant vessel, captured on the high seas and sent into the American port with the intention of being kept there indefinitely, and without any means of leaving that port for another, as contemplated in the treaty and required to be shown in the commission of the vessel bringing in the prize. Certainly such use of a neutral port is very far from that contemplated by a treaty which made provision only for temporary asylum for certain purposes, and cannot be held to imply an intention to make of an American port a harbor of refuge for captured prizes of a belligerent government. We cannot avoid the conclusion that in thus making use of an American port there was a clear breach of the neutral rights of this government, as recognized under principles of international law governing the obligations of neutrals, and that such use of one of our ports was in no wise sanctioned by the Treaty of 1799.

It remains to inquire whether there was jurisdiction and authority in an admiralty court of the United States, under these circumstances, to order restoration to an individual owner of the vessel and cargo.

The earliest authority upon this subject in the decisions of this court is found in the case of *Glass* v. *The Sloop Betsy*, 3 Dallas, 6, decided in 1794, wherein it appeared that the commander of the French privateer, *The Citizen Genet*, captured as a prize on the high seas the sloop *Betsy* and sent the vessel into Baltimore, where the owners of the sloop and cargo filed a libel in the District Court of Maryland, claiming restitution because the vessel belonged to subjects of the King of Sweden, a neutral power, and the cargo was owned jointly by Swedes and Americans. The District Court denied jurisdiction, the Circuit Court affirmed the decree, and an appeal was prosecuted to this court. The unanimous opinion was announced by Mr. Chief Justice Jay, holding that the District Courts of the United States possessed the powers of courts of admiralty, whether sitting as an instance or as a prize court, and sustained the jurisdiction of the District Court of Maryland, and held that that court was competent to inquire into and decide whether

restitution should be made to the complainants conformably to the laws of nations and the treaties and laws of the United States.

The question came again before this court in the case of *The Santissima Trinidad*, decided in 1822, reported in 7 Wheaton, 283. In that case it was held that an illegal capture would be invested with the character of a tort, and that the original owners were entitled to restitution when the property was brought within our jurisdiction. The opinion was delivered by Mr. Justice Story, and, after a full discussion of the matter, the court held that such an illegal capture, if brought into the jurisdiction of the courts of the United States, was subject to condemnation and restitution to the owners, and the learned justice said:

> If indeed, the question were entirely new, it would deserve very grave consideration, whether a claim founded on a violation of our neutral jurisdiction could be asserted by private persons, or in any other manner than a direct intervention of the government itself. In the case of a capture made within a neutral territorial jurisdiction, it is well settled, that as between the captors and the captured, the question can never be litigated. It can arise only upon a claim of the neutral sovereign asserted in his own courts or the courts of the Power having cognizance of the capture itself for the purposes of prize. And by analogy to this course of proceeding, the interposition of our own government might seem fit to have been required before cognizance of the wrong could be taken by our Courts. But the practice from the beginning in this class of causes, a period of nearly 30 years, has been uniformly the other way; and it is now too late to disturb it. If any inconvenience should grow out of it, from reasons of state policy or executive discretion, it is competent for Congress to apply at its pleasure the proper remedy. (Page 349.)
>
> . . . Whatever may be the exemption of the public ship herself, and of her armament and munitions of war, the prize property which she brings into our ports is liable to the jurisdiction of our courts, for the purpose of examination and inquiry, and if a proper case be made out, for restitution to those whose possession has been devested by a violation of our neutrality; and if the goods are landed from the public ship in out ports, by the express permission of our own government, that does not vary the case, since it involves no pledge that if illegally captured they shall be exempted from the ordinary operation of our laws. (Page 354.)

In the subsequent cases in this court this doctrine has not been departed from. *L'Invincible*, 1 Wheaton, 238, 258; *The Estrella*, 4 Wheaton, 298, 308, 9, 10, 11; *La Amistad de Rues*, 5 Wheaton, 385, 390.

It is insisted that these cases involve illegal captures at sea, or violations of neutral obligation, not arising because of the use of a port by sending in a captured vessel and keeping her there in violation of our rights as a neutral. But we are at a loss to see any difference in principle between such cases and breaches of neutrality of the char-

acter here involved in undertaking to make of an American port a depository of captured vessels with a view to keeping them there indefinitely. Nor can we consent to the insistence of counsel for appellant that the prize court of the German Empire has exclusive jurisdiction to determine the fate of the *Appam* as lawful prize. The vessel was in an American port and under our practice within the jurisdiction and possession of the District Court which had assumed to determine the alleged violation of neutral rights, with power to dispose of the vessel accordingly. The foreign tribunal under such circumstances could not oust the jurisdiction of the local court and thereby defeat its judgment. *The Santissima Trinidad, supra,* p. 355.

Were the rule otherwise than this court has frequently declared it to be, our ports might be filled in case of a general war such as is now in progress between the European countries, with captured prizes of one or the other of the belligerents, in utter violation of the principles of neutral obligation which have controlled this country from the beginning.

The violation of American neutrality is the basis of jurisdiction, and the admiralty courts may order restitution for a violation of such neutrality. In each case the jurisdiction and order rests upon the authority of the courts of the United States to make restitution to private owners for violations of neutrality where offending vessels are within our jurisdiction, thus vindicating our rights and obligations as a neutral people.

It follows that the decree in each case must be

Affirmed

BOOK REVIEWS

Lord Stowell: His Life and the Development of English Prize Law. By E. S. Roscoe. Houghton Mifflin Co., Boston and New York. 1916. pp. x, 116.

Lord Stowell belongs to that rare company of jurists to whom came the opportunity of determining the form and substance of an important branch of law for an indefinite period in the future. Such an opportunity came to John Marshall to formulate the constitutional law of the United States, and how admirably he met it is known of all men. Not less unique was the work of Lord Stowell in the development of British prize law. To be sure, decisions in prize were in existence which went as far back as the eighteenth century, but most of them were bare statements of results, with no reasoning as to the principle concerned. In this state of the law England became involved in the Napoleonic Wars in which almost every conceivable maritime situation arose and necessitated an examination of the fundamental principles upon which prize law rests. This gave Stowell his opportunity. Appointed Judge of the High Court of Admiralty in 1798, he continued until the downfall of Napoleon to give out from his seat in London a series of reasoned judgments in which he practically created the Anglo-American prize law of the present day, and gave it a coherency and a logical basis which it has ever since retained. In the face of this prodigious achievement, it is one of the anomalies of history that, while forgotten worthies have been forced upon public attention by industrious writers, the great Lord Stowell has thus far escaped an adequate biography.

Mr. Roscoe's book is divided into eight chapters. The first two are biographical and relate the story of Stowell's career as a teacher at Oxford, his friendship with Dr. Johnson, his rapid rise at the bar, and his elevation to the bench. The third chapter is a clear account of the Court of the Admiral and the development of his prize jurisdiction and the rules governing its exercise. The description of the condition of English prize law in 1798, when Stowell became the head of the Admiralty Court, supplies a good background against which to exhibit the

extent of his services in reducing existing rules to systematic form and in adapting principles to new situations. The fourth and fifth chapters deal specifically with some of Stowell's most important judgments, while the sixth is a consideration of the relation between Stowell's decisions and the rules of the Declaration of London. The seventh chapter describes the use made of Stowell's decisions by the British prize courts in the present war, while the last chapter is devoted to Stowell's work in the Admiralty Court on the civil side.

In derogation of an excellent piece of work, it must be said that as a biography the book is entitled to scant consideration, but as an essay on Stowell's work as a prize judge it is worthy of its author's position and high repute. Nowhere will the beginner in prize law find a better introduction to the intricacies of the organization of the British Court of Admiralty than is furnished by Mr. Roscoe's third chapter. The condition of British prize law when Stowell came to the bench and the contrast between its present certainty and systematic form and the *amas de textes si variés*, which even now make up French prize law, are well described. In the consideration of some of the most important of Stowell's decisions a clear conception is given of the quality of Stowell's mind and of the processes by which he reached his conclusions. In short, Mr. Roscoe's book amply explains the authoritative position which Lord Stowell occupies in all British and American prize courts.

LAWRENCE B. EVANS.

International Realities. By Philip Marshall Brown. Charles Scribner's Sons: New York. 1917. pp. xvi, 233.

This is a collection of articles written by Professor Brown since the outbreak of the war, dealing in a constructive way with the general principles of international organization and law. The style is simple and forceful. The subjects considered are of the most vital and profound significance. They are treated in a way to interest equally the student and the average reader.

The first article has the title of the book. He holds that the old conception, still fostered by many publicists, "that international law [is] mainly, if not primarily, concerned with the regulation of war," is an unreality at present, and that "the idea that international law shall regulate war is essentially paradoxical and unsound." He asserts that "the true function of international law is not to govern war, it is to avert

war." This statement is further amplified in a subsequent article (p. 127) by the assertion that "war is the negation of law," and that war and neutrality are "essentially abnormal in character." This proposition, that war and neutrality are abnormal, worked out in its logical ramifications, Professor Brown makes the basis of all the "international realities." In the preface he asserts that the real function of international law is that of "regulating the peaceful relations of states." In this view of international law, he regards the Golden Rule as "in reality, the only safe fundamental principle for international relations." The development of international organization and law, in his opinion, requires the determining of "the specific mutual interests which the nations are prepared to recognize"; the endeavoring, "in a spirit of toleration, friendly concern, and scientific open-mindedness, to formulate the legal rights and obligations which these interests entail;" and the "securing of the most effective agencies for [the] interpretation and enforcement" of the law so formulated.

The next article — on "Nationalism" — is a plea for the recognition of nationality in the fundamental dispositive arrangements of soil and jurisdiction which shall be agreed upon by the nations as the *status quo*. By *nationality* he means "community of interests." In order to utilize nationality as a scientific basis in the creation of new states so as to secure the highest degree of stability possible, he considers it necessary that the new state should have "a population bound together with common sympathies, and adequate to render the state vigorous and self-sufficient; territory including varied resources, with rivers, ports and all natural facilities for economic organization; and a government so representative of the people as to enable them to deal effectively with other nations and fulfil their just obligations." A state so organized, that is, a state in the true and real sense, has, in Professor Brown's opinion, a personality of its own differing in nature from those of the individuals composing it and having different duties and different rights; its function being to secure the individuals composing it in the enjoyment of their rights and in the performance of their duties.

In the article on "The Rights of States" it is asserted that all states are unequal, and that they have no fundamental and equal rights and duties inherent in the mere fact of international personality. That states are unequal no one will dispute. That they have certain fundamental rights and duties as respects which they are all equal is, in the opinion of the reviewer, equally indisputable. Men and nations are

unequal in certain respects when measured by certain standards, and equal in certain other respects when measured by certain other standards. It is necessary in national and international organization to recognize, and to equalize, through artificial rights and duties legislatively determined, the inequalities of men and states, in those respects in which they are in reality unequal. It is also necessary, as the Declaration of Independence and the platform of the American Institute of International Law assert, in national and international organization, to recognize, and to maintain through a declaration of inherent rights, the equality of men and states in those respects in which they are, in reality, equal.

The article on "The Limitations of Arbitration" expresses the conclusion concerning arbitration with which most scholars will doubtless agree, — that arbitration is "to be considered chiefly as an adjunct, or auxiliary of diplomacy," and that it is not "a general panacea for all international ills."

In dealing with "International Administration" Professor Brown would seem to be unduly pessimistic. He asserts that agreement concerning the mutual interests which nations are prepared to recognize must precede organization. As matter of fact, history shows that development of organization and continuous agreement concerning mutual interests go on everywhere simultaneously, and act and react on each other. The only step forward in international organization which he regards as possible is the establishment of a clearing house for the existing international public unions. This ultra-conservative position seems out of harmony with the progressive ideas which pervade the book. The society of nations already is organized to a considerable extent on conciliative and coöperative principles, and there is a growing appreciation of the vast possibilities of effective international direction by the more complete application of these principles. The reviewer would certainly include among the international realities of the present day the widespread perception of these possibilities and the growing purpose of people everywhere to give to the society of nations after the war a real constitution, in which provision shall be made scientifically for coöperative processes and organs capable of exercising efficient advisory direction over those matters which are common to all nations, or are beyond the competency of any one.

In the article on "Ignominious Neutrality," neutrality is regarded as an abnormal condition growing out of the abnormal condition of war.

The conclusion reached by Professor Brown, that it is the duty of each neutral to judge between the belligerents and intervene on the side which to it appears to be just, will doubtless not meet with general approval. Such a view of neutrality would involve any neutral nation adopting it in the balance-of-power system of international control, which Professor Brown very properly deprecates as opposed to any real international organization or law; for probably no neutral ever intervened so as to throw the balance of power in a certain direction except on the alleged ground that it was intervening on the side of "justice." All intervention of individual states is apt to confuse justice with self-interest, and to lead to future wars "to redress the balance of power." Neutrality and intervention are antagonistic ideas. An international law which should require each non-belligerent nation to assume the attitude of a judge, with a view to intervention, would in fact abolish neutrality and substitute for it prospective belligerency. Moreover, the facts leading to wars are so complicated that it is impossible for any nation to form an opinion concerning the rights and wrongs as between belligerents, which can be called, in any true sense, a judgment. After war begins, war-censorship and war-necessity result in the concealment and distortion of facts. The reviewer differs from Professor Brown in the conclusions to be drawn from his premises. The proper conclusion, as it appears to the reviewer, is that, upon the outbreak of war, it is the right and duty of all neutrals, collectively as well as individually, to protect and preserve themselves and to conserve the society of nations. This involves, not forcible intervention, but collective and individual protective action and collective mediation. The experience of the world with intervention has not been sufficiently encouraging to warrant the belief that the international law of the future will impose upon nations not engaged in war, either individually or collectively, the duty of extending the war by forcible intervention. It is more probable that that law, instead of abolishing neutrality, will safeguard and magnify it; recognizing that the first duty of each nation is to its own nationals, and that its only other duty is to the whole society of nations.

In the essay on "The Dangers of Pacifism," the true pacifism is rightly defined as that which holds that peace is attainable through effort directed towards the establishment of an efficient international organization and an international law based on those principles which are the permanent realities of individual and social life. True pacifism, as Professor Brown well says, does not imply inertness; on the contrary,

it involves thorough preparedness on the part of each nation and its citizens to perform their just international, national and individual duties, and to secure their just international, national and individual rights.

"Pan-Americanism" is studied as typical of real internationalism. It is through the wholly voluntary and coöperative system of organization that the nations of the world are, in Professor Brown's opinion, to be brought into unity.

The final article on "The Substitution of Law for War," like that on "Ignominious Neutrality," frankly accepts war as an abnormal condition, justifiable in some cases only by the same course of reasoning by which organized communities justify self-redress by individuals. The underlying principles of self-redress by individuals are that it is justifiable when the circumstances of the particular case are such that the community could not possibly furnish a means of redress, or when the community could have provided a means of redress and has neglected to do so.

The last article leaves us heavily weighed down under the burden of the "international realities," but with hope of a result from great and long-continued labors. Peace, as Professor Brown shows, means the slow and gradual substitution of facilities for community redress of national injuries, instead of the existing facilities for self-redress by war. The task is "stupendous," but within the limits of human capacity.

The book is, in the opinion of the reviewer, one of the most notable which the Great War has produced. Its teaching reminds one of the conscientious and reasonable abolitionist argument against slavery which finally prevailed. It sweeps away the unstable compromises of the text-writers who usually devote the greater part of their attention to "the laws of war," by asserting that war is incapable of regulation in the ordinary sense, and is to be "regulated" only as disease is "treated" — that is, with a view to its abolition at the earliest possible moment.

It is a fact of consequence that a professor of international law in Princeton University, a diplomat of wide experience, should thus commit himself to the war-abolitionist party. If it be true that it is an international reality that war is abnormal, it means that the war-abolitionist party of the world, whose platform is that war is an unnecessary evil, has already acquired supremacy over the combined forces of the war-

enthusiast party, whose platform is that war is a necessary good, and of the war-fatalist party, whose platform is that war is a necessary evil.

The inventions which this war has evolved have apparently strengthened national means of defense and weakened national means of external domination. If the war shall prove that these inventions have abolished domination on sea or land, or in the air, by any one nation, this will mean that national ambitions will no longer find outlet in the control of external communities for national benefit, and that such ambitions must hereafter be directed toward the control of the natural forces of the universe for national and international benefit. Once the possibility of national domination ceases, the desire for international fellowship will doubtless operate so effectively that all war will in fact be civil war, and thus abnormal.

But even if it shall prove that these inventions have not abolished the possibility of national domination of external communities, the experiences through which the world is passing must have swelled the ranks of the war-abolitionists everywhere; and it is reasonable to believe that the world after the war will accept, as one of the fundamental international realities, the proposition to which Professor Brown commits himself, that war is abnormal and an unnecessary and remediable evil.

A. H. SNOW.

Les Traités Fédéraux et la Législation des États aux États-Unis. Paris: Librairie Générale de Droit et de Jurisprudence. pp. 228.

Mr. Bates has attempted a difficult task in seeking to disentangle from our *daedalus* of decisions the real relation of the treaty-making power to the other branches of the government. He has fortunately applied to this intricate subject the lucid and precise thinking of the trained French mind, and the result has been a clear, concise, comprehensible monograph on this difficult subject.

In order to make the situation intelligible to the foreign mind he begins with an historical *résumé* of the situation and explains the lamentable breakdown of American treaties during the period of Confederacy. This he follows by an excellent discussion of the relations between the Federal Government and the States, and the difficulties which, by reason of this relationship, arise regarding treaties dealing with matters covered by State legislation.

The conflict between State statutes and treaties regarding the

rights of foreigners to transfer and inherit property are set out fully, and Dr. Bates has admirably grasped the essential point of the numerous decisions of the Supreme Court, stating them briefly, but accurately. The greater part of his monograph is taken up with an analysis of these decisions. An entire chapter, for instance, is given to the conflict between treaties and State legislation regulating the administration of justice, and the much mooted question of consular rights of administration is ably discussed.

For an American lawyer with the cases before him and our various works on the subject, especially Butler's complete and able volumes on the treaty-making power, this monograph does not furnish new light. It should, however, have a very useful *rôle* in explaining to foreign jurists and thinkers the difficulties inherent under our constitutional system in respect to treaties. The possibility that treaties may be declared unconstitutional or may be in practice overridden by State statutes is difficult of understanding by the Continental jurist.

It has always seemed to the writer that Hamilton was correct in believing that treaties, like the Constitution itself, should be placed beyond the legislative power to repeal by subsequent statute, and should in reality be "the supreme law of the land." An unconstitutional treaty seems almost a contradiction in terms, yet it is the settled law of the United States that a treaty at any time may be overridden by a subsequent statute. This often places our foreign affairs at the mercy of the temporary majority in Congress. A recent Shipping Act, for instance, practically abrogated some eighteen treaties, and produced great confusion in our shipping relations with the foreign countries affected.

It would seem difficult to find any remedy without constitutional amendment. It may be, however, that as the United States emerge from their supposed isolation, our legislators will pay greater heed to treaty obligations and hesitate to pass laws which may abruptly and unjustly affect them.

The action of Congress in regard to the Chinese Treaty, which action was sustained as valid by the Supreme Court, would, in the case of a powerful and aggressive nation, easily have led to war. It is well that a publicist of standing should have made our difficulties clear to the foreign world.

FREDERIC R. COUDERT.

War: Its Conduct and Legal Results. By T. Baty and J. H. Morgan. London: John Murray. 1915. pp. xxviii, 578. 10/16 net.

The scope and importance of this volume are indicated by the main divisions: the Crown and the Subject, the Crown and the Enemy, the Crown and its Treaty Obligations, the Subject and the Enemy, and the Crown and the Neutral. The chapters dealing with the effects of the present war on British subjects and other persons within British jurisdiction are the work of Professor Morgan, while those dealing with questions of international law are the work of Dr. Baty. The authors state, however, that the volume was prepared in close coöperation and that they are jointly and severally responsible for it as a whole. The appendix contains a valuable collection of documents illustrating the text.

Under the head of The Crown and the Subject, Professor Morgan gives a full analysis of the acts and regulations adopted for the defense of the realm, particularly of the Defense of the Realm Consolidation Act of November 27, 1914. The necessity for the enactment of such a stringent measure is denied, and the regulations adopted under it are vigorously assailed by the writer, who comments on the fact that not a single member of the House of Commons criticised the bill during its progress through the House. In the Lords, however, it was opposed by Lord Halsbury and Lord Bryce.

It is astonishing to what an extent the constitutional rights of Englishmen have been suspended as a result of the wholly unprecedented condition in which England finds herself to-day. Professor Morgan asserts that,

> For the first time in England for at least two hundred and fifty years, a civilian may be sentenced to death without trial by jury. . . . Considering that the king's courts are still sitting, that the king's writ runs throughout the realm, and that juries can be, and are being, empanelled every day, we think this subjection of the lives of private citizens to military law is entirely unjustified. The death penalty, once inflicted, is irrevocable. — (pp. 110–111.)

Again (p. 112) he says:

> Certainly never in our history has the Executive assumed such arbitrary power over the life, liberty, and property of British subjects. The net of restriction is now so finely woven, so ingeniously designed, that it enmeshes every activity of the citizen.

After citing a number of instances in which arbitrary power may be employed, he adds:

> The private citizen is placed under the absolute orders of any major holding His Majesty's commission. The military authority issues these orders, and the military authority decides whether the citizen has offended against them. To challenge these Regulations in a court of law will, as we have seen, be often difficult and sometimes impossible. To "appeal" against the sentence of a court-martial to a civil court may be attempted by a writ of *certiorari*, but precedents are not encouraging. We must leave the reader to judge for himself whether this "Parliamentary despotism," which recalls nothing so much as the kind of legislation hitherto exclusively reserved for uncivilised Protectorates, is either necessary or wise.

In view of the expressions just quoted, it would appear that freedom of speech was one of the rights of which Englishmen had not been deprived at the time this book was written.

The sea policy of England had not been fully developed when this book was published. The chapters written by Dr. Baty, therefore, do not discuss the practical application of the measures adopted by Great Britain in restraint of neutral trade. Most of the vital points of British policy are, however, strongly condemned in advance. On "military areas," for example, Dr. Baty says (pp. 224-225):

> We attach no special importance to the declaration issued by the British Admiralty, affecting to make the North Sea "a military area." All that such a declaration can effect is to put neutrals on guard; to inform them that their presence in such waters will be regarded as suspicious, and that, when navigating there, they will be more than ordinarily liable to charges of contraband trading or of unneutral service. Probably no more is meant.

The doctrine of continuous voyage as laid down by the Supreme Court of the United States in the Civil War cases is strongly condemned, and the assertion is made that the attempt of the United States to apply the doctrine of continuous voyage to blockade has been "universally reprobated, and finds no sanction in the Declaration of London (Arts. 18, 19)." Summing up the policy adopted soon after the outbreak of the war by Great Britain in regard to contraband and continuous voyage, he says:

> This may be beneficial to Great Britain in the immediate present. It is our duty only to point out that it goes far beyond what neutrals have tolerated in the past and may be calculated to drive them into the arms of a belligerent. (p. 379.)

Another policy which Great Britain has pursued is condemned in even stronger terms (p. 391):

> We should add, with the strongest reprobation, that by Art. 47 of the Declaration of London, a member of the belligerent armed forces may be forcibly taken from on board a neutral merchant ship. Since the foreign captor cannot be contradicted, this opens up the way to the most violent abuses, and is in conflict with all that has been maintained by America and Great Britain in the controversies regarding impressment and the *Trent* respectively. There is little doubt, as Dr. T. A. Walker says, that Britain was wrong in 1807 and right in 1862. The inviolability of the neutral flag, except under due sentence of a prize court, cannot be too firmly maintained. It is here set at nought in a quite anachronistic fashion.

It would thus appear that Great Britain has little legal ground to stand on. It is interesting to note that the full development of British maritime policy has not shaken Dr. Baty's convictions, for in this JOURNAL for January, 1916, he criticises this policy with great frankness and severity. The reader lays down the volume with the conviction that laws, national and international, are made for peace and that war is anarchy. *Inter arma leges silent.*

JOHN H. LATANÉ.

International Cases, Arbitrations and Incidents illustrative of International Law as Practised By Independent States. Volume II. War and Neutrality. By Ellery C. Stowell and Henry F. Munro. Boston: Houghton Mifflin Company: pp. xvii, 662. $3.50 net.

There is no date on the title page, an omission to be regretted, but the date of the preface is "November 1916."

The work is one of 662 pages and it is the second volume in a series. The preface sets out as follows the advantages thought to appertain to a collection of this sort made while war is in progress.

> In time of war acts of governments and those for whom they stand responsible are to be judged upon the facts as they appear at the time, especially when the government concerned makes no effort to furnish the evidence which it has at its disposal or which it might procure. Hence it is that a collection of cases to serve as a basis for the study of the law of war and neutrality ought to be made *flagrante bello*. With the return of peace any incident of a controversial nature can be subjected to a *post mortem* examination, studied and dissected, but it can no longer serve as a living example.
>
> With this thought in view we have endeavored to make a full collection of the material relating to the war in course and take advantage of the moment which will not return to make "the volume a wartime publication."

This intention of the learned editors gives character to the whole work. The leading older cases and examples are largely omitted. The current cases and diplomatic declarations and correspondence are extensively transcribed and included. The result is that while the view of the authorities is by no means comprehensive and compendious, yet it is modern and contemporaneous and gives much of high value not yet accessible in the standard works.

Many subjects take on new importance through practices and inventions which are novel, or, if not wholly so, have been greatly amplified in the present war.

To illustrate the predominance of new material, under the title "Occupation," which includes 19 references, 14 have to do with the present war and five with those of the past. Of ten references under the title "The Status and Treatment of Noncombatants, Nonintercourse, Guides, Human Screens, Levees en Masse," all ten pertain to the present war.

Among the many precedents and practices of novel extensions, at least in modern war, which are treated, is the expulsion or internment of alien enemies at the outbreak of the war, a doctrine of vast import to us if we become parties belligerent. Among those incidents or expedients included and illustrated by recent events or themselves important acts in the great struggle, the following are conspicuous: "The Use of Asphyxiating Gases; The *Lusitania*; Prisoners Used to Screen a Pontoon Bridge; The Execution of Captain Fryatt; Belgian Protest regarding the Removal of Railways; Illegal Requisition of Stud Horses, Mares and Colts; A System of General Terrorization; Poisoning Wells; Wireless Messages; The *Deutschland* (dealing with the rights of submarines); The Doctrine of Ultimate Consumption, as a new extension of that of continuous voyage; Neutral Mails; The Blacklisting of American Merchants; and many more involving doctrines, perhaps not less important and not less new either in theory or extent and application. No opinion as to the justice and legality or humanity of these doctrines or practices is commonly intimated in this work. The diplomatic statement on one or both sides is quoted, often a transcript of the facts or negotiations is printed from a government publication, the New York *Times*, the London *Times*, or other like source. The student's approval or disapproval is left to such uncolored recitation.

In 1893 Dr. Freeman Snow, of Harvard, published his *Cases and*

Opinions on International Law, and in 1902 Dr. James Brown Scott published his *Cases on International Law* based on Dr. Snow's work. The purpose of Dr. Scott was to derive and exhibit the principles of international law mainly from judicial decisions. In this he was most successful, and his valuable work is yet the leading case-book on this profound subject.

Messrs. Stowell and Munro by no means place the accent on judicial decision. They place it rather on recent practice in the field of war and on diplomatic and official correspondence between belligerent and neutral nations. Their work is of high interest and value, quite indispensable to the rapid investigator in these lines at the present time. It has of necessity, however, a temporary character and will require extended revision after the close of the great war and the adjustment of pending questions.

Professor Stowell was educated at Harvard and in the Universities of Berlin and Paris and in the diplomatic section *Ecole libre des sciences Politiques* of Paris. He was a limited participant at the Second Hague Conference and at the Conference of London. His more extended expression of opinion on the topics included would have been gladly received and valued had his plans permitted. However, the compilation offered is welcome, convenient, and, as has been said, almost essential to those who seek to follow and to try to understand the myriad modifications, extensions, and often perversions which the old rules of international law are suffering in the present desperate belligerency of more than half the world.

CHARLES NOBLE GREGORY.

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